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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-398

PLAN FOR ARCADIA, INC., a non-profit corp.,

Petitioner,

vs.

ANITA ASSOCIATES, SANTA ANITA CONSOLIDATED, INC., RUSSELL TRAIN, as Administrator, Environmental Protection Agency, RONALD REAGAN, Governor of the State of California, JOHN MAGA, Executive Officer, California Air Resources Board, ROBERT G. LUNCHE, Acting Air Pollution Control Officer for Los Angeles County Air Pollution Control District and CITY OF ARCADIA CITY COUNCIL,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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PLAN FOR ARCADIA, INC., a non-profit corp.,

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ANITA ASSOCIATES, SANTA ANITA CONSOLIDATED, INC., RUSSELL TRAIN, as Administrator, Environmental Protection Agency, RONALD REAGAN, Governor of the State of California, JOHN MAGA, Executive Officer, California Air Resources Board, ROBERT G. LUNCHE, Acting Air Pollution Control Officer for Los Angeles County Air Pollution Control District and CITY OF ARCADIA CITY COUNCIL,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, Plan for Arcadia, Inc., respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 10, 1974.

Opinion Below.

The Opinion of the Court of Appeals, 6 ERC 1975 (9th Cir. 1974), appears in the Appendix hereto, page 1. The Memorandum Opinion Defying Preliminary Injunction and Dismissing Complaint rendered by the District Court for the Central District of California also appears in the Appendix, page 4.

Jurisdiction.

The Judgment of the Court of Appeals for the Ninth Circuit was entered on July 10, 1974. A timely petition for rehearing was denied on September 9, 1974, and this petition for certiorari is filed within 90 days of that date. On September 25, 1974, the Court made its order staying issuance of mandate to remain in effect provided this petition is filed on or before October 9, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether a private suit may be brought under the Emergency Powers provisions of the Clean Air Act of 1970 where the federal Administrator authorized to abate a pollution source imminently endangering the lives and health of persons fails and refuses to take action.

2. Whether a private suit may be brought under the Citizen Suits provisions of the Act or otherwise to enjoin a private source of air pollution that will prevent indefinitely the attainment of adopted air quality standards in an area already in serious violation of such standards.

Statutory Provisions Involved.

United States Code, Title 42:

§1857 h-1. EMERGENCY POWERS

"Notwithstanding any other provisions of this Act, the Administrator, upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to the health

of persons, and that appropriate State or local authorities have not acted to abate such sources, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary."

§1857 h-2. CITIZEN SUITS

"(a) . . . any person may commence a civil action on his own behalf (1) against any person . . . who is alleged to be in violation of (A) an emission standard or limitation under this Act . . . or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with such Administrator . . .

"(e) Nothing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief . . .

"(f) For purposes of this section, the term 'emission standard or limitation under this Act' means—

"(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or

"(2) a control or prohibition respecting a motor vehicle fuel or fuel additive,

which in effect under this Act or under an applicable implementation plan."

Statement of the Case.

The plaintiff, Plan for Arcadia, Inc., petitioner herein, seeks to enjoin the proposed operation of a large regional shopping center under construction in Arcadia, California. Petitioner is a non-profit corporation whose membership consists of thousands of people residing within two miles of the center.

None of the respondents, consisting of the owners and builders of the shopping center and the federal, state and local agencies responsible for administering the Act, have taken any action under the Act regarding this project, presumably because California has not yet adopted the required implementation plan and permit procedure.

The shopping center is being constructed in the San Gabriel Valley, 15 miles east of downtown Los Angeles, California. It is an area that has the most dangerous motor vehicle-related air pollution in the entire United States [Clerk's Transcript Vol. I, p. 56].

The statutory purpose and scheme of the Clean Air Act are set forth in the Appendix hereto, page 9. Appellants' Opening Brief, pages 14-18.

During the past three years two of the primary ambient air quality standards established pursuant to the Act, standards which when exceeded more than one day per year produce injury to human health, including respiratory damage and cardiovascular disease, were exceeded hundreds of days each year.[1]

---

[1]Primary standards for oxidants or ozone (photochemical smog) were exceeded almost every day of each of the three months of July, August and September for a total of 223 days in 1970, 210 days in 1971 and 185 days in 1972. On most of such days the standards were exceeded by from 3 to 6 times such permissible levels of air pollution [C.T. Vol. I, pp. 56-

Beginning on the proposed opening date, October 14, 1974, the shopping center will generate the concentrated traffic of 23,000 motor vehicles each day, resulting in an incredible 219% increase in existing harmful air pollutants in that area [C.T. Vol. I, p. 56].

The addition of such motor vehicle-related air pollutants will by itself cause, among the 50,000 persons including plaintiff's membership living within two miles of the shopping center, from 2 to 15 excess deaths each year, from 2,000 to 4,000 excess episodes of disease aggravation and from 10,000 to 30,000 excess episodes of individuals suffering impairment of important functions of the body,[2] in the opinion of one of the nation's leading medical epidemiologists [C.T. Vol. I, p. 132, Affidavit of Dr. John R. Goldsmith]. Further, he felt the upper limits of these estimates should be used. At no time have any of the respondents considered such lethal and injurious consequences from the operation of the shopping center.

Such additional motor vehicle traffic and related air pollution to be generated by the proposed shop-

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57, Affidavit of air pollution specialist, Dr. Joseph V. Behar]. If the shopping center had been in operation the concentrations of harmful ozone would have exceeded federal standards by 10 to 14 times in the months indicated [C.T. Vol. I, p. 57].

For carbon monoxide, such standards were violated 25 days in 1970, 32 days in 1971 and 47 days in 1972. It can neither be seen nor smelled and is most hazardous in the winter months when ozone conditions are not generally as prevalent [C.T. Vol. I, p. 56]. If the shopping center had been in operation there would have been concentrations of carbon monoxide in excess of permissible federal primary standards in 12 additional months of such period, creating a serious health hazard [C.T. Vol. I, p. 57].

[2]"As many as 4,000 deaths and 4 million illness-related days off per year are caused each year by auto air pollution in urban areas of the nation, according to a study by the National Academy of Sciences". UPI release, September 5, 1974.

ping center will make it impossible to attain national primary ambient air quality standards by 1977 as required by the Clean Air Act of 1970[3] or within the foreseeable future in the vicinity of the shopping center and downwind up to ten miles [C.T. Vol. I, p. 56].

Assuming the automobile industry has the technology to produce a "clean" car by 1977, it would be five to six years after that before one-half of the old cars would be replaced by "clean" ones, by which time motor vehicle emissions still could not be reduced in the San Gabriel Valley sufficiently to meet primary air quality standards.

Obviously, no implementation plan under the Act could have authorized at this time and in that be-

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[3](i) §1857 c-4(a)(1)(A). January 30, 1971. Statutory deadline for publication of proposed national primary and secondary ambient air quality standards ["within 30 days after the date of enactment (Dec. 31, 1970) of the Clean Air Amendment of 1970. . ."].

(ii) §1857 c-4(a)(1)(B). April 30, 1971. Last date for promulgation of such standards ["no later than 90 days from publication"]. This deadline was met.

(iii) §1857 c-5(a)(1). January 31, 1972. Deadline for submission of state implementation plans [within 9 months of 2, above].

(iv) §1857 c-5(a)(2). May 31, 1972. Deadline for approval or disapproval of state plans [within 4 months of 3, above].

(v) §1857 c-5(c)(3). July 31, 1972. Deadline for federal Administrator to adopt implementation plan if state fails to do so [within 6 months of 3, above].

(vi) §1857 c-5(a)(2)(A)(i). July 31, 1975. Deadline for attainment of adopted primary air quality standards [within 3 years of 5, above, unless time extended 2 years by procedure in 7, below].

(vii) §1857 c-5(e)(1). July 31, 1977. Deadline for attainment of adopted primary air quality standards when extended for maximum of two years. Confer *Riverside v. Ruckelshaus*, 4 E.R.C. 1728 (C.D. Cal. 1972). Opinion contained in Exh. "A" to Appellants' Opening Brief. Appendix herein, p. 46.

leaguered area the unconditional operation of any new concentrated air pollution source of the magnitude of this regional shopping center [C.T. Vol. I, p. 57].

The decision of the Ninth Circuit (Appendix, p. 1) discusses none of these uncontroverted facts. All of them have been known to respondent agencies at least since December, 1973, if not before.

The Act itself contains mandatory statutory deadlines which required respondent agencies to adopt implementation plans, including land use and moving source controls, by July 31, 1972. See footnote 3, *supra.*

Congress has not amended the Act to alter such timetable of compliance. Assuredly, no court can do so, notwithstanding *Natural Resources Defense Council v. E.P.A.*, 475 F.2d 968 (1973).

Although primary air quality standards for oxidants, carbon monoxide and four other pollutants were adopted as required on April 30, 1971, 40 C.F.R. §§50.1-50.11, no implementation plan for California has yet been adopted by respondent agencies.

Construction of the shopping center foundations was begun on June 6, 1973. The within action was filed on October 23, 1973.

The Court of Appeals affirmed the District Court denial of petitioner's application for a preliminary injunction and dismissal of the complaint. The Court held, in short, that because no implementation plan has been adopted for California, no private right of action or remedy is yet available under the Act. See Appendix, page 1.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Ignored the Issue Raised by the Failure of Respondent Administrator of the Environmental Protection Agency to Exercise His Authority Under the Emergency Powers Provision.

This is the first suit under the Act seeking to enjoin a specific source of motor vehicle-related air pollution.

Considerable attention, both public agency and judicial, has been given to whether clean air areas can be dirtied substantially. And then only on a rule-making level.

Strangely, no attention whatsoever has been given to the critical situation where the air already is so dangerously polluted as to imperil the lives and health of thousands. And now is about to be impacted by a 219% increase.

Under the Emergency Powers provisions of the Act, *supra,* respondent Administrator of the EPA has the authority to bring suit to prevent the operation of the shopping center. Each statutory requirement is present under the uncontroverted facts of this case:

1. The operation of the shopping center will present "an imminent and substantial endangerment to the health of persons".

2. The "appropriate State or local authorities have not acted to abate such source".

3. The powers are specifically available against "moving sources" of pollution such as the traffic to be generated by the shopping center.

4. The power "to immediately restrain any person causing or contributing to the alleged pollution" is "not-

withstanding any other provision" of the Act. This means that the reason stated in the decision for denying petitioner any relief, the fact that California has not yet adopted an implementation plan, is not applicable.

Petitioner has strenuously contended that the failure and refusal of respondent Administrator to exercise his emergency powers provides petitioner with authority to do so. See Appellants' Opening Brief, Appendix herein, page 32 and Petition for Rehearing, page 5.

The decision, in ignoring this issue entirely, states "Congress has defined precisely the circumstances under which a private suit may be brought under this Act." This is totally erroneous. There are at least four separate bases for a private action against respondent Administrator for failure to exercise his emergency powers.

First, although the statute uses the term "*may* bring . . . suit to restrain any person . . . or . . . to stop the emission of air pollutants", §1857 h-1, *supra* (italics added), we contend that the duty of respondent Administrator to at least consider exercising his emergency powers in this situation is not discretionary. This he has refused to do.

Accordingly, this suit will lie under the Citizen Suits provision. §1857 h-2(a)(2), *supra.*

Three other jurisdictional bases not "defined precisely" in the Act are available to petitioner under the Citizen Suits provision, §1857 h-2(e) which provides "Nothing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

These include 28 U.S.C. §1361:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer of the United States or any agency thereof to perform a duty owed to the plaintiff."

See *Carter v. Seamans*, 411 F.2d 767 (5th Cir. 1969).

Also available is §10 of the Administrative Procedure Act, 5 U.S.C. §701-706.

> §702 "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a regular statute, is entitled to judicial review thereof."

See *People v. United States Department of Agriculture*, 427 F.2d 561 (D.C. Cir. 1970).

Lastly, it is a well-settled principle of federal law that, where necessary to give full effect to Congressional purpose and intent, the Courts will imply appropriate civil remedies in favor of a plaintiff who is within the class of persons intended to be protected by the legislation and endangered by agency inaction. See *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), and *Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031 (9th Cir. 1970).

It is true that the emergency powers issue was not specifically raised before the trial court. And for several valid reasons.[4] See Appellants' Opening Brief, Appendix hereto, page 33.

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[4]In summary, at the hearing before the trial court, petitioner had no affidavit relating the serious air pollution conditions to human health and was granted permission to file such affidavit when it could be obtained. More importantly, the court made it clear then [Rep. Tr., p. 4] and in its Memorandum Opinion

The importance of the Emergency Powers provisions reach to the heart of the Clean Air Act, whose objective is "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population". 42 U.S.C. §1857 (b)(1).

Such powers affect the implementation of this objective in every state of our nation. If there ever is or will be a circumstance in the United States in which the Clean Air Act Emergency Powers provisions are to apply to lethal motor vehicle-related air pollution, this is such a case.

No factory or industrial stationary source with such potential lethal effect from its stack gas would ever be permitted by respondent Administrator to be operated.

If the endangered citizens themselves have no right or remedy to act in such an emergency when the respondent EPA Administrator refuses to exercise his clear authority to do so, the unenforceable Emergency Powers provision is indeed the death warrant for thousands of Americans.

Unless this Court issues its writ in this matter the decision below vindicates the illegal inaction of respondent Administrator and of the 48 states who illegally have refused to adopt moving source implementation plans mandated by the Act §1857 c-5.

As of June 1, 1974, only Alabama and Florida had adopted plans which have been approved by the EPA.

[C.T. Vol. I, pp. 136-140 and Appendix herein, p. 4], that it did not dispute the seriousness of air pollution in the area of the proposed shopping center but that its decision to dismiss the complaint was based upon its conclusion that in the absence of an implementation plan for California, petitioner had no judicial remedy.

Eight other states have adopted plans which have not been approved by the EPA and ten others, including California, have draft regulations in the public hearing stage but have not adopted any plan. The balance of 30 states are doing nothing at all to implement the Act.[5]

Because the Act gives respondent Administrator alone emergency powers to act whether or not the states have implementation plans, his arbitrary refusal to act, if not subject to judicial review, can critically undermine the complex statutory scheme to achieve and maintain clean air in the United States.

It is now almost four years since the Act was adopted. So long as major new pollution sources such as this massive shopping center are permitted to proceed and thus benefit from agency inaction, the pressure from private commercial interests is to frustrate implementation plans and thus to perpetuate agency inaction. See footnote 3, *supra*.

If, on the other hand, operation of this pollution source were enjoined forthwith, such interests, no longer benefiting from agency delays, would join petitioner and others in urging all states and responsible agencies to adopt promptly the required plans or regulations.

Thus, those who are now part of the problem would become part of the solution.

---

[5]Telephone conference, August 20, 1974, between petitioner's counsel and EPA planner, David Healey, Region 9, San Francisco.

2. The Decision Below Is a First and Faulty Construction of the Citizen Suits Provisions of the Clean Air Act That Will Affect Implementation Plans in Each of the 50 States.

As stated above, only two of the 50 states have approved implementation plans for attaining the adopted primary air quality standards by 1977 as mandated in the Act. All states were required by law to have such plans approved by May 31, 1972 [1857 c-5 (c)(3)]. See footnote 3, *supra.*

In denying the right to petitioner under the Citizen Suits provisions [42 U.S.C. §1857 h-2] the decision holds, in effect, that such illegal delays and inaction leaves citizens totally without any judicial relief whatsoever under the Act. Such a ruling dignifies agency inaction with the authority to abrogate the specific responsibility mandated by Congress in the Act, a delegation of power alien to our basic concept of justice.

It is factually undisputed that the operation of this shopping center, commencing on October 14, 1974, will prevent the attainment of primary air quality standards in the San Gabriel Valley by 1977 or any reasonable time thereafter.

It is petitioner's contention that the violation of the statutory timetable for attaining adopted primary air quality standards gives petitioner the right to bring the within citizen suit to enjoin private respondents Anita Associates and Santa Anita Consolidated, Inc., who are responsible for such violation (§1857 h-2(e)).

Support for this view is found in a careful reading of the definition of "emission standard or limitation"

which includes both the adopted primary air quality standards and the timetable for achieving and maintaining them, the violation of which permits "any person" to "commence a civil action on his own behalf against any person . . ." §1857 h-2(a):

> "§1857 h-2(f) For purposes of this section, the term 'emission standard or limitation under this Act' means—
>
> "(1) a schedule or timetable of compliance. . .
> "which is in effect under this Act . . . or under an applicable implementation plan".

The "schedule or timetable of compliance" refers to the attainment of primary ambient air quality standards no later than July 31, 1977 [see footnote 3 above].

That this timetable is "in effect under this Act" rather than "under an implementation plan" is manifest.

That primary ambient air quality standards are also "in effect under the Act" rather than "under an implementation plan" is also manifest 40 C.F.R. §50.1-§50.11).

If the Act intended to restrict citizen suits only to violations of "emission standards" as that term is used in an entirely different part of the Act referring to motor vehicle exhaust controls [§1857 f-1], it would have been simple to so state, rather than to employ an elaborate definition which embraces ambient air quality standards and the statutory timetable for attaining them.

And if the Act intended, as the decision holds, that citizen suits would be permitted to enforce violations of only those standards or limitations, if any, to be

found in an applicable state implementation plan, there would be no reason to state in the citizen suit provisions that such standard or limitation means, among other things, "a schedule or timetable of compliance . . . *which is in effect under this Act . . . or* under an applicable implementation plan." [§1857 h-2(f)(1)] (Italics added).

The decision disposes of this entire citicial issue in a footnote comment, "Plaintiffs argue that the national emission standards may be invoked under (1)(A), but subsection (f) is clear and against them on this argument". See Appendix, p. 2.

The Court of Appeals grounded its decision on a single issue, ". . . we cannot order the promulgation of any particular regulation or set of regulations, such as appellants seek here . . ." Appendix, p. 3. But petitioner sought no particular regulation or implementation plan. As emphasized above, any such plan or regulation in compliance with the Act would necessarily have prohibited at this time and in that area the unconditional operation of this huge additional pollution source.

Moreover, the decision and respondents concede that the Citizen Suits provisions of the Act would permit this type of action by a private party if such plans or regulations had been promulgated as required but were not being enforced.

To maintain that citizens in the same position have no right to sue a private polluter where the agencies' inaction consists not of failure to enforce their regulations, but failure to promulgate the regulations in the first place is contrary to logic.

Conclusion.

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Ninth Circuit.

Respectfully submitted,

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and
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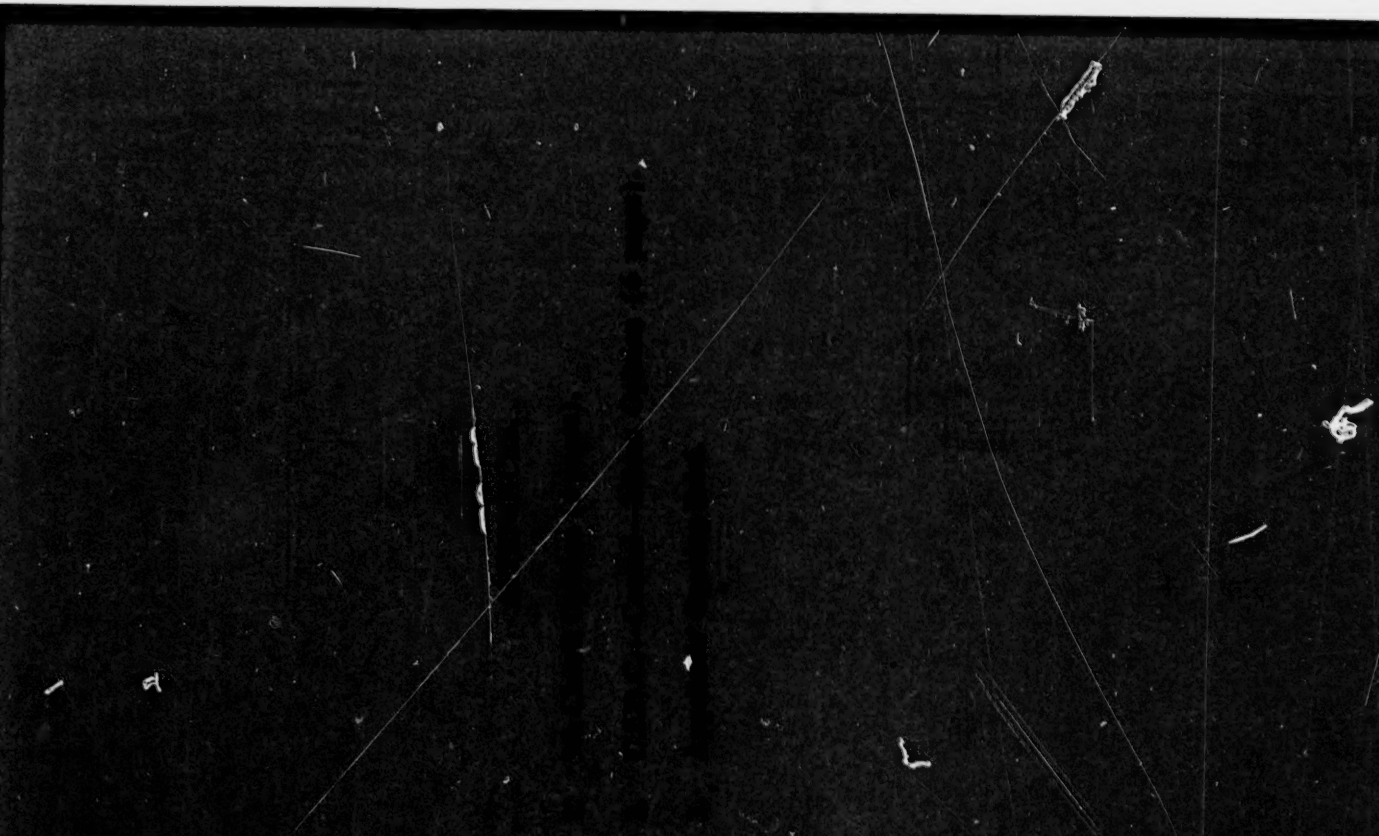

Opinion of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit.

Plan for Arcadia, Inc., a nonprofit corporation, and Jack Saelid, Plaintiffs-Appellants, v. Anita Associates, Santa Anita Consolidated, Inc., Russell Train, as Administrator, Environmental Protection Agency, Ronald Reagan, Governor of the State of California, John Maga, Executive Officer, California Air Resources Board, Robert G. Lunche, Acting Air Pollution Control Officer for Los Angeles County Air Pollution Control District and City of Arcadia City Council, Defendants-Appellees. No. 74-1180.

Appeal from the United States District Court for the Central District of California.

Filed: July 10, 1974.

Before: CARTER and GOODWIN, Circuit Judges, and SCHNACKE, District Judge*

SCHNACKE, District Judge:

This action, purportedly brought under the air pollution prevention and control statute, 42 U.S.C. §§1857 *et seq.*, was dismissed by the court below. We affirm.

Appellants commenced this action to enjoin the further construction and operation by appellees of a large regional shopping center which, it is claimed, would produce large quantities of air pollution. They also sought mandatory orders compelling state and federal officials to promulgate regulations and plans, pursuant

*Honorable Robert H. Schnacke, United States District Judge, Northern District of California, sitting by designation.

to the statute, that would prevent the construction of pollution-creating developments like that here involved.

The statute charges the states with the initiative in assuring air quality control and of submitting an implementation plan before December 31, 1970 (sic). Sections 1857c-2(a), (b); 1957c-5(a)(1).

The primary federal official is the Administrator. If the state plan submitted to him is not acceptable, he may issue his own plan in lieu of the state's, as well as take other action. Sections 1857c-2(c), 1857c-5(c)(3).

The record discloses that the state of California has submitted an implementation plan which has been approved in part and rejected in part. The area of the shopping center here involved is presently subject to no control that would prevent its construction or operation as appellees intend.

The statute is quite explicit as to actions by private litigants. "Citizen suits" may be brought under 42 U.S.C. § 1857h-2:

> "(1) against any person . . . who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> "(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."

Since, as noted, no applicable standards or orders have been issued, this action will not lie under (1).[1]

[1]Plaintiffs argue that the national emission standards may be invoked under (1)(A), but subsection (f) is clear and against them on this argument.

Understandably, appellants do not claim that (2) may be invoked. Rather, they invoke 28 U.S.C. §1361, which is likewise inapplicable. Undeniably, certain types of action by the Administrator may be ordered by the courts. *Nat. Res. Def. Coun., Inc. v. Environmental Prot. Agcy.*, 475 F.2d 968 (D.C. Cir. 1973). But we cannot order the promulgation of any particular regulation or set of regulations, such as appellants seek here, and once regulations are promulgated, the sole statutory review is as provided in 42 U.S.C. §1857h-5(b)(1).

Congress has defined precisely the circumstances under which a private suit may be brought under this Act. As the court below correctly determined, appellants do not meet the test.

Affirmed.

Memorandum Opinion Denying Preliminary Injunction and Dismissing Complaint.

United States District Court, Central District of California.

Plan for Arcadia, Inc., etc., et al., Plaintiffs, vs. Anita Associates, Santa Anita Consolidated, Inc., et al., Defendants. No. 73-2480-JWC.

Filed: Dec. 12, 1973.

On October 23, 1973, this action was commenced on behalf of a group of residents and property owners of the City of Arcadia to enjoin the further construction in that City of a new shopping center (Santa Anita Fashion Park) upon the grounds that when completed this facility would attract such a concentration of vehicular traffic as would raise ambient air pollution above national air quality standards, established pursuant to the provisions of the Clean Air Act 42 U.S.C. § 1857, et seq. Plaintiffs further seek to compel the Administrator to formulate completed air quality implementation plans for the State of California, as contemplated by the Act.

The plaintiffs are Plan for Arcadia, Inc., a nonprofit corporation, whose membership consists of certain residents and property owners, and Jack Saelid, an individual who resides in the vicinity of the project.

The defendants are the owners and developers of the land on which the shopping center is being built and Government officials, both state and local, who have responsibilities for implementing Clean Air Act standards.

The matter is now before this court on an application for preliminary injunction and a motion to dismiss as against the Governmental officials.

The general scheme of the relevant provisions of this Act follows:

It creates the position of Administrator, who is mandated to promulgate regulations establishing national primary and secondary ambient air quality standards for certain kinds of air pollutants [Title 42 § U.S.C. 1857c-4]. The states are required to formulate implementation plans by which the individual states can reach the national air quality standards promulgated by the Administrator. The Administrator is to review these plans and approve or disapprove them, according to the criteria set forth in the Act. [42 U.S.C. § 1857c-5]. If the state fails to formulate an acceptable plan within the period allowed, the Administrator is required to promptly prepare regulations setting forth an implementation plan for the delinquent state. [42 U.S.C. § 1857c-5(c)]. By way of enforcement, private parties are empowered to bring citizen suits against persons who are in violation of the regulations promulgated under the Act, or against the Administrator for failure to perform non-discretionary duties. [42 U.S.C. 1857h-2].

California has submitted a proposed plan, which has been accepted in part by the Administrator. This plan relates both to stationary sources ("any building, structure, facility or installation which emits or may emit any air pollution"[1]) and mobile sources, which though as yet are not defined, are clearly intended to relate to motor vehicles, aircraft and the like.

In *Natural Resources Defense Council v. Environmental Protection Agency*, 475 F.2d 968 (D.C. Cir. 1973), came the first suggestion that a third source

[1]Title 42 U.S.C. § 1857c-6(a)(3) specifically so defines the term "stationary sources".

should be regulated, namely, a "complex source", by which is meant a facility that has or leads to secondary or adjunctive activity which emits or may emit a pollutant. New regulations promulgated with respect to complex sources specifically list shopping centers as one kind of "indirect source." 38 Fed. Reg. 29895. Although it had previously been held in *Riverside v. Ruckelshaus,* 4 E.R.C. 1728 (C.D.Cal. 1972) that the original implementation plan for California should have been completed by July 31, 1972, the court in *Natural Resources Defenses Council, supra,* set up a new time table ordering the Administrator to review the maintenance provisions of all state plans in the light of its decision. Where a state's plan was disapproved, the state would have until April 15, 1973, to submit a new plan [this date was changed to August 15, 1973, at a later time. *See* 38 Fed. Reg. 12920 (1973)]. If a state failed to submit a plan by the deadline, as has occurred here, the Administrator was to publish a plan for the state within four months after the deadline date (December 15, 1973). Accordingly, the Administrator has until December 15, 1973, to promulgate the new portions of the implementation plan for California.

Since the plaintiffs' only remedy under the Act is against persons who are in violation of regulations promulgated under the Act and since no regulations have been promulgated with respect to shopping centers, it follows that no cause of action is stated against the corporate defendants.

Plaintiffs argue, however, that the shopping center should come under the stationary source regulations, because even though referred to as a "complex source", it is in fact only one kind of a stationary source. How-

ever, the discussion of complex sources in the regulations, in addition to defining that term, clearly distinguishes between stationary sources and complex sources [38 Fed. Reg. 6279-80] and plaintiffs' argument in this respect is without merit.

Plaintiffs also argue that even in the absence of regulations controlling complex sources, the Act clearly precludes the construction of any project which would interfere with, or prevent attainment and maintenance of, national primary and secondary air quality standards. [42 U.S..C §§ 1857c-5 and 1857c-6].

This court does not so read these statutes. Contrary to plaintiffs' contentions, these sections of the Act do not clearly preclude construction of projects which might interfere with the attainment and maintenance of air quality standards, rather they provide merely for the promulgation of implementation plans and the setting of standards of performance for stationary sources.

Defendants Ronald Reagan, Governor of the State of California, and John Maga, Executive Officer of the State Air Resources Board, have been sued as officers of the State of California. The complaint seeks to compel California to comply with § 110 of the Clean Air Act [42 U.S.C. § 1857c-5], which requires each state to adopt and submit to the Administrator "a plan which provides for implementation, maintenance and enforcement" of national primary ambient air quality adopted by the Administrator. In the first place, there is no judicial remedy provided in the Act or elsewhere for the failure of the state to adopt and submit a plan. The only consequence of a state's failure to submit a plan is that the Administrator, then, has the duty to impose a plan upon the state, and no other remedy

against the state exists. Secondly, the plaintiffs, as private citizens, are given no authority under the Act to bring such an action. The motion to dismiss on behalf of these defendants, therefore, should be granted.

As to the defendant, Russell Train, as Administrator of the Environmental Protection Agency, it is apparent from what has been said above that this action is premature.

It appears to this court that not only does the complaint fail to state facts upon which relief can be granted, but that there are no facts which can be alleged within the perimeters of the complaint which would afford the plaintiffs a basis for recovery. This action is, therefore, dismissed as to all parties.

DATED: December 12, 1973.

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

No. 74-1180

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PLAN FOR ARCADIA, INC., a nonprofit corporation, and JACK SAELID,

Plaintiffs-Appellants,

vs.

ANITA ASSOCIATES, SANTA ANITA CONSOLIDATED, INC., RUSSELL TRAIN, as Administrator, Environmental Protection Agency, RONALD REAGAN, Governor of the State of California, JOHN MAGA, Executive Officer, California Air Resources Board, ROBERT G. LUNCHE, Acting Air Pollution Control Officer for Los Angeles County Air Pollution Control District and CITY OF ARCADIA CITY COUNCIL,

Defendants-Appellees.

On Appeal From the United States District Court for the Central District of California.
Honorable Jesse W. Curtis, Judge.

APPELLANTS' OPENING BRIEF.

STATEMENT OF ISSUES PRESENTED FOR REVIEW.

This action focuses the following questions of first impression which are of national concern, and which affect the lives, health and safety of thousands of citizens:

1. Does the Clean Air Act of 1970, 42 U.S.C. § 1857, authorize direct action by private citizens against persons creating sources of air pollution which endanger lives, health and safety and which will prevent attainment or maintenance of

national primary ambient air quality standards as promulgated in 40 C.F.R. §§ 50.1-50.11 (attainment and maintenance of which standards are necessary to protect public health, 42 U.S.C. § 1857c-4)?

2. Does such an action exist where the Administrator of the Environmental Protection Agency and the State of California are in violation of the Act for failure to promulgate and enforce a plan of implementation and/or regulations designed to attain and maintain national primary ambient air quality standards?

3. Does the Act authorize such action by private citizens upon an undisputed factual showing that the responsible agencies refused to act pursuant to available emergency authority where there is imminent endangerment to their lives, health and safety and where the Act was passed for their benefit and protection?

4. Did the trial court err in refusing to issue a preliminary injunction?

STATEMENT OF THE CASE.

A. Nature of the Case.

In this action Appellants, Plan for Arcadia, Inc. and Jack Saelid (hereinafter collectively "plaintiffs"), seek to enjoin the further construction or operation of a 72-acre, regional shopping center being erected in Arcadia, California. Plan for Arcadia, Inc. is a nonprofit corporation whose membership consists of thousands of residents and property owners residing in the city of Arcadia in the vicinity of the proposed shopping center. Jack Saelid is an individual who resides in the city of

Arcadia within approximately 300 yards of said shopping center. Appellees Anita Associates and Santa Anita Consolidated, Inc. (hereinafter collectively "Santa Anita") are the owners, developers and builders of said shopping center.

Plaintiffs assert that said shopping center is being constructed in violation of the Clean Air Act of 1970, 42 U.S.C. § 1857. Pursuant to the requirements of 42 U.S.C. § 1857c-4, national primary ambient air quality standards with respect to certain lethal air pollutants have been established and are set forth in 40 C.F.R. §§ 50.1-50.11. By definition the attainment and maintenance of these standards are necessary to protect the public health. 42 U.S.C. § 1857c-4.

The uncontroverted facts shown* by plaintiffs include the following:

1. The area where this major shopping center is being constructed in the San Gabriel Valley fifteen miles east of downtown Los Angeles has probably the most dangerous smog in the entire United States.

2. The present lethal and injurious effects of this smog have not been determined by defendants.

3. The vehicle traffic to be generated by this huge project (23,000 vehicles each day) will cause an incredible 219% increase in existing harmful air pollutants in the area.

4. In the opinion of one of the nation's leading medical epidemiologists, addition of such motor vehicle related air pollutants will, by itself,

*For the purposes of this appeal said showing stands uncontroverted. See discussion in Subpart B, *infra, Summary of the Proceedings to Date.*

> cause from 2 to 15 excess deaths a year among the 50,000 persons living within two miles of the shopping center, from 2,000 to 4,000 excess episodes of disease aggravation, and from 10,000 to 30,000 excess episodes of individuals suffering impairment of important functions of the body. Further, he felt the upper limits of these estimates should be used [Affidavit of Dr. John R. Goldsmith, Cl. Tr. Vol. I, p. 132].*

Consequently, the Santa Anita project poses a direct, imminent threat to the lives, health, safety and well-being of plaintiffs.

Indeed, for some of the plaintiffs the permit issued by the City of Arcadia for the construction of this project is a death warrant.

Under the Act, the Administrator of the Environmental Protection Agency and the State of California have the direct duty and responsibility for attainment and maintenance of the national primary ambient air quality standards. In accordance with the mandatory timetable set forth in § 1857c-5 of the Act, a State of California plan of implementation or, in the alternative, federal regulations promulgated by the Administrator designed to attain and maintain the primary standards were to have been in effect no later than July 31, 1972. It is not disputed that both the Administrator and the State of California are in violation of the Act for failure to meet this deadline. Such was the holding in *Riverside v. Ruckelshaus*, 4 E.R.C. 1728 (C.D. Cal. 1972) (opinion attached hereto as Exhibit "A"). Even

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*All references to the Clerk's Transcript shall be abbreviated as "Cl. Tr.". References to the Reporter's Transcript will be abbreviated as "R. Tr.".

at this late date more than one and one-half years after the July 31, 1972 deadline, the State of California has still not submitted an adequate plan of implementation. And while the Administrator recently signed "complex" or "indirect source" regulations, 39 Fed. Reg. 7269 (Feb. 25, 1974), those regulations will not take effect until January 1, 1975 and will apply only to indirect sources "commenced" after that date. As such they will have no application to the Santa Anita project.

By their unlawful failure to meet the mandatory deadlines of the Act for promulgating a plan of implementation or appropriate regulations, the Administrator and the State of California have not only frustrated congressional intent, but have jeopardized the lives, health and safety of plaintiffs. As the intended beneficiaries of the Act, plaintiffs now seek to enjoin Santa Anita from proceeding with its project unless and until it can be demonstrated that the same will not prevent attainment or maintenance of primary ambient air quality standards, and further seeks an order requiring the remaining public servant appellees (hereinafter collectively referred to as "the Agencies") to perform their duties under the Act by taking any action necessary to halt construction or operation of the shopping center until it can be demonstrated that the same will not prevent attainment or maintenance of primary ambient air quality standards.

Notwithstanding the citizen suit provision of the Act, 42 U.S.C. § 1857h-2, which was designed specifically to give private citizens a remedy where the responsible Agencies fail to act, and in the teeth of the well settled principle of federal law that the courts will fashion appropriate civil remedies where necessary to give ef-

fect to congressional intent, Santa Anita and the Agencies assert that plaintiffs have no remedy whatever under the Act, even though the Santa Anita project will prevent attainment or maintenance of the primary standards and is an immediate and serious threat to the lives, health and safety of plaintiffs. As the trial court agreed with this position in dismissing plaintiffs' complaint and denying their application for a preliminary injunction [Cl. Tr. Vol. I, p. 136], the central issue now joined on this appeal is whether or not such a private right of action does exist. If so, it is respectfully submitted that it is abundantly clear that in reversing the trial court's dismissal of the complaint, the order denying plaintiffs' application for a preliminary injunction should also be reversed.

B. Summary of the Proceedings to Date.

Petitioners filed a complaint [Cl. Tr. Vol. I, p. 1], and applied for a temporary restraining order on October 23, 1973. The application for temporary restraining order was denied by Judge Jesse W. Curtis on October 24, 1973, and plaintiffs' application for a preliminary injunction was heard on November 5, 1973. At this time, Judge Curtis observed that this is a case of first impression and suggested that the hearing be treated as a proceeding on a motion for summary judgment so that the issue could be presented to this court on appeal as soon as possible. In this connection Judge Curtis stated:

> "Gentlemen, the application for a preliminary injunction, it seems to me here, reaches the meat of the whole controversy. It would seem to me that we ought to be hearing this matter on a motion for summary judgment.

"I might as well be frank with you. My present inclination is to deny it for legal and substantive grounds. Since this is a rather new field, I really feel that some opinion ought to be written. But I don't feel like writing an opinion on a denial of an application for a preliminary injunction and then have you turn around and file a motion for summary judgment and have to grant that. I would be inclined to grant that.

"I think what you want is to get this matter on appeal as soon as you can, if that is the way I am going to decide the matter, and I expect it will be. I suggest we get it on appeal as soon as possible without spinning our wheels here." [R. Tr., p. 4].

The parties stipulated to this procedure [R. Tr., pp. 5, 20-21], and the parties having so stipulated, Judge Curtis stated that if he ruled in favor of defendants, he would assume that all of the allegations in the plaintiffs' affidavits were true [R. Tr., pp. 20-21].

The matter was then taken under submission and on December 12, 1973, the court issued a memorandum opinion [Cl. Tr. Vol. I, p. 136] denying plaintiffs' application for a preliminary injunction and dismissing the complaint without leave to amend.

On January 7, 1974, plaintiffs applied to the trial court for and were denied an injunction pending appeal [R. Tr., p. 36]. At this time plaintiffs waived any right they might otherwise have had to findings of fact and conclusions of law and the court ruled that the same would not be required inasmuch as the court had ruled upon the matter as "essentially a motion to dismiss." [R. Tr., p. 40]. Thereafter, in order that the

matter might be decided on its merits before this court at the earliest possible time, plaintiffs and Santa Anita stipulated to a waiver of findings of fact and conclusions of law and further stipulated to a waiver of any procedural defects which might exist in the manner in which the judgment was reached [Cl. Tr. Vol. I, p. 156].

On January 9, 1974, plaintiffs filed their Notice of Appeal [Cl. Tr. Vol. I, p. 143] and on February 1, 1974, they applied to this court for an injunction pending appeal. On February 25, 1974, said application was denied, but this appeal was expedited, and the clerk was directed to place the matter on an early argument calendar (Order, filed Feb. 25, 1974). On March 9, 1974, plaintiffs served their Motion to the Honorable William O. Douglas for Injunction Pending Appeal, which motion is still pending.

C. The Facts.

The City of Arcadia where Santa Anita's shopping center is being built "has the most dangerous smog in the State of California . . . and probably in the nation." [Affidavit of Dr. Joseph V. Behar, chemist and air pollution specialist, Cl. Tr. Vol. I, p. 56]. Further, "[t]he eastern portions of the South Coast Air Basin receiving as they do a substantial amount of pollutants from metropolitan areas to the west, are the most heavily polluted by motor vehicle exhaust of any place in the state (or elsewhere). Accordingly, developments which would add to the pollution exposure of such an area are especially hazardous." [Goldsmith Affidavit, Cl. Tr. Vol. I, p. 130].

In that area during each of the past three years the Clean Air Act primary ambient air quality standard

for oxidants or ozone (photochemical smog), a standard which when exceeded more than one day per year produces injury to human health, including respiratory damage and cardiovascular disease, "was exceeded in Arcadia almost every day of each of the three months July, August and September for a total of 223 days in 1970, 210 days in 1971 and 185 days in 1972. Because there is no horse racing during these months these figures do not include traffic generated by such activity. Such averages for oxidants or ozone show that the standards were exceeded most of these days by from three to six times federal standards. This is what is commonly known as smog." [Behar Affidavit, Cl. Tr. Vol. I, pp. 55-56]. "In addition, carbon monoxide in the vicinity of the race track violated federal standards 25 days in 1970, 32 days in 1971 and 47 days in 1972. It can neither be seen nor smelled and is most hazardous in the winter months when ozone conditions are not generally as prevalent." [Behar Affidavit, Cl. Tr. Vol. I, p. 56].

Presently under construction by Santa Anita adjacent to their race track in Arcadia is a major regional shopping center. It will contain four major department stores, 125 other retail shops and 5,039 vehicle parking spaces [Complaint, Cl. Tr. Vol. I, p. 2]. Scheduled for completion on October 1, 1974, it will attract 23,000 automobiles each weekday [Behar Affidavit, Cl. Tr. Vol. I, p. 55].

Notwithstanding a related state action brought on May 1, 1973 by plaintiffs, the foundations for the shopping center were commenced after the City of Arcadia issued a foundations-only permit on June 6, 1973. The foundations were completed on October 26, 1973, three days after this action was filed. Construc-

tion continues above ground pursuant to a building permit issued July 10, 1973, by the City of Arcadia [Affidavit of Ernie Weber, Santa Anita project manager, Cl. Tr. Vol. I, p. 65].

Immediately upon opening for business on October 1, 1974,

> "[t]he addition of the traffic from the proposed shopping center will cause an additional 219% increase in these harmful pollutants over existing peak hourly concentrations from existing traffic in the area. . . . Such additional traffic to be generated by the proposed shopping center will make it impossible to attain federal primary standards within the foreseeable future in the vicinity of the shopping center and downwind up to 10 miles." [Behar Affidavit, Cl. Tr. Vol. I, p. 56].

When the shopping center is placed in operation the additional automobile traffic will have immediate lethal effect. Dr. John R. Goldsmith, one of the nation's leading medical authorities on the adverse effects of smog and carbon monoxide on human beings, was asked under oath "to estimate how much increase in illness or extra fatalities might be attributable to an increase in motor vehicle emissions in this area. . . ." [Goldsmith Affidavit, Cl. Tr. Vol. I, p. 131]. He responded by stating:

> "In my judgment it is reasonable to anticipate that with such an increase in air pollution from this project that the population of approximately 50,000 in this area might experience from 2 to 15 excess deaths per year, from 2,000 to 4,000 excess episodes of disease aggravation and from 10,000 to 30,000 more of the individuals might show

some impairment of important functions of the body." [Goldsmith Affidavit, Cl. Tr. Vol. I, p. 132].

Dr. Goldsmith also stated: "In view of the knowledge that the San Gabriel Valley has the most severe motor vehicle related air pollution in the country, it is reasonable to use the upper limits of these estimates in order to provide a base for estimating the current motor vehicle-pollution-related health damage". [Goldsmith Affidavit, Cl. Tr. Vol. I, p. 131].

These uncontroverted statistics and opinions constitute a shocking evaluation of this private project not made public by Santa Anita or the agencies. The building permit thus becomes a death warrant for 15 people each year and a license to impair indefinitely the health of thousands in the area.

No action whatsoever regarding this shopping center has been taken by the Agencies. In fact, the statutory deadline of July 31, 1972 for establishing regulations or implementation plans passed without compliance by any of the Agencies. There has been *no* extension of this deadline and no court has the authority to grant such extension or to abrogate the singular emergency provision in the Clean Air Act and thus to deprive plaintiffs of the protection afforded by the Act to their lives, health and safety. 42 U.S.C. § 1857c-5, *Riverside v. Ruckleshaus,* 4 E.R.C. 1728 (C.D. Cal. 1972); *Natural Resources Defense Council v. Environmental Protection Agency,* 475 F.2d 968 (D.C. Cir. 1973).

No factory or plant or industrial stationary source with such potential lethal effect from its stack gas would ever be permitted by the Agencies to be con-

structed or operated. Thus, even though the Agencies have failed to promulgate plans of implementation or regulations covering the Santa Anita project, the emergency powers available to appellee Train (the Administrator) pursuant to 42 U.S.C. § 1857h-1 apply also to "moving sources" and are "notwithstanding any other provisions of this Act." This means that such powers must be exercised whether or not implementation plans or regulations have been adopted.

It is clear that Santa Anita is proceeding with the construction of this huge shopping center as rapidly as possible and is spending large sums of money in an effort to complete the project at the earliest possible date [Weber Affidavit, Cl. Tr. Vol. I, pp. 63-66]. Thus, if this Court finds that plaintiffs have stated a claim under the Clean Air Act, the trial court's denial of a preliminary injunction should be reversed as well. Otherwise, Santa Anita will complete its project before a final determination is reached in this action. The courts will then be faced with a *fait accompli*, depriving them as a practical matter of their jurisdiction. Only by such a preliminary injunction can the relative positions of the parties be preserved and the plaintiffs be protected from having their rights effectively foreclosed by the passage of time.

Finally, it is manifest from the record in this case that although it has been over three years since the Act was adopted, none of the Agencies intend to take any affirmative action to enforce the Act against Santa

Anita until ordered to do so by a court of law, regardless of the danger to the lives, health and safety of plaintiffs. So long as major new pollution sources such as this massive shopping center are permitted to proceed and thus benefit from agency inaction, the pressure from private commercial interests is to perpetuate such agency inaction. If, on the other hand, construction of this shopping center were enjoined forthwith, such interests, no longer benefiting from agency delays, would join plaintiffs in urging the responsible Agencies to adopt promptly the required plans or regulations. Thus, those who are now part of the problem would become part of the solution.

ARGUMENT.

I.

The Clean Air Act of 1970 Confers Upon Plaintiffs the Right to Enjoy Clean Air and the Right to Bring Suit to Enforce Such Right When the Responsible Agencies Fail to Do So.

A. The Act Was Designed to Benefit Plaintiffs.

The express purpose of the Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population. . . ." 42 U.S.C. §1857(b)(1). The House Interstate and Foreign Commerce Committee reported the 1970 Clean Air Amendments with the following statement:

> "The purpose of the legislation reported unanimously by your committee is to speed up, expand, and intensify the war against air pollution in the United States with a view to *assuring that the air we breathe throughout the Nation is wholesome once again.*"
>
> House Report No. 91-1146, June 3, 1970, 1970 U.S. Code Congressional & Administrative News, page 5356 [Emphasis added].

B. Attainment and Maintenance of National Primary Ambient Air Quality Standards Are Essential to Protect the Public Health.

The Act requires the Administrator of the Environmental Protection Agency to establish national primary ambient air quality standards for dangerous pollutants, the attainment and maintenance of which standards "are requisite to protect the public health." 42 U.S.C. § 1857c-4. Pursuant to this requirement the

Administrator on April 30, 1971, published regulations establishing national standards for ambient air quality with respect to six specified air pollutants (sulfur dioxide, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons and nitrogen dioxide). 40 C.F.R. §§ 50.1-50.11.

C. The Agencies Are in Violation of the Act for Failure to Adopt an Adequate State Implementation Plan and/or to Promulgate Appropriate Regulations to Insure Attainment and Maintenance of National Primary Ambient Air Quality Standards.

42 U.S.C. § 1857c-5 establishes the mechanism by which the national ambient air quality standards are to be attained and maintained. The states were to present implementation plans designed to achieve the goals of the Act. If a state failed to submit an implementation plan, or if its implementation plan was inadequate in any respect, the Administrator was to promulgate satisfactory regulations. The timetable specified in the Act provides that such regulations were to have been in force throughout the country by July 31, 1972.

The State of California, however, failed to submit a plan adequately providing for the attainment of the national primary air quality standards with regard to several important pollutants, including photochemical oxidants (smog) in the Los Angeles area. Nor did the Administrator remedy this failure with adequate regulations by July 31, 1972. This failure was found to be a violation of the Action *Riverside v. Ruckelshaus, supra.*

Despite *Riverside v. Ruckelshaus* and the passage of more than a year and a half since the statutory deadline, adequate regulations are still not in force in the

Los Angeles area. Presently regulations regarding "complex" or "indirect" sources, such as the Santa Anita shopping center, are not scheduled to be in effect until January 1, 1975 and in any event will not apply to projects commenced prior to that date. 39 Fed. Reg. 7269, Feb. 25, 1974.

D. If the Agencies Had Performed Their Duties Under the Act, the Santa Anita Project Could Not Have Been Started in Its Presently Planned Form as It Clearly Will Prevent the Attainment and Maintenance of the National Primary Ambient Air Quality Standards.

As discussed in some detail above at pages 8-10, the San Gabriel Valley, where Santa Anita's project is being built, now has the most severe air pollution in the entire United States, regularly experiencing concentrations of pollutants several times the national primary ambient air quality standards. The record also shows that the concentrated automobile traffic to be generated by this center will further increase the level of pollution in this area by 219%. There is no dispute that the construction of this center will render attainment and maintenance of the national primary ambient air quality standards in this area impossible. Thus, it is clear that no set of regulations prepared in compliance with the Act could have permitted the construction of this project. Had the regulations required by the Act been in force in Los Angeles on July 31, 1972, Santa Anita's project, not commenced until the summer of 1973, would have been subject to those regulations and could not have been approved in its presently planned form.

E. The "Citizen Suit" Provision of the Act Was Designed Specifically to Promote Direct Enforcement by Private Citizens Where the Responsible Administrative Agencies Have Failed to Take Appropriate Action.

42 U.S.C. § 1857h-2 provides for the enforcement of the Act by private citizens against the Administrator or against any person alleged to be in violation of ". . . an emission standard or limitation under this chapter . . ." It has been shown that the construction of the Santa Anita project will prevent the attainment and maintenance of the national primary air quality standards. Certainly such standards as required by § 1857c-4 of the Act and promulgated in 40 C.F.R. §§ 50.1-50.11 are emission standards or limitations under the Act. As such they may be enforced by private citizens under section h-2.

Moreover, Santa Anita agrees that the citizen suit provisions of the Act would permit this type of action by a private party to enjoin a private polluter if adequate regulations had been promulgated but were not being enforced by the Agencies. To maintain that citizens in the same position have no right to sue a private polluter where the Agencies' inaction consists not of failure to enforce their own regulations, but of failure to promulgate the regulations in the first place, is contrary to logic. Such a result would contravene the congressional purpose embodied in the citizen suit provision. Senator Muskie, presenting these amendments to the Senate, stated:

> "Finally, the bill extends the concept of public participation to the enforcement process. The citi-

zen suits authorized in this legislation would apply important pressure. Although the Committee does not advocate these suits as the best way to achieve enforcement, it is clear that they should be an effective tool". 116 Cong. Rec. 32903 (1970).

Further, Senator Spong said:

"We have carefully preserved the right of the public to participate in the pollution abatement process. In one significant respect, we have broadened that right. We have written into the bill a section authorizing citizens to bring suits on their own behalf to assure enforcement of standards, emission requirements or implementation plans." 116 Cong. Rec. 32919 (1970).

Thus, the importance of the citizen suit provision has been summarized as follows:

"The citizen suit provision is a tremendous addition to the enforceability of air pollution standards. Inadequate manpower to enforce standards has long been a major problem in controlling pollution. Instead of the few enforcement personnel that governmental agencies provide, this provision would remedy the problem by making every person a potential enforcement official. As a practical matter, the government is not likely to commit the resources to enforce standards adequately, but citizens' suits can make them effective." *Federal Control of Stationary Source Air Pollution,* 2 Ecology L.Q. 283, 306 (Spring, 1972).

II.

Plaintiffs Have Implied Civil Remedies to Enforce the Act.

The citizen suit provisions of the Act aside, it is clear that plaintiffs have implied civil remedies to enforce the same. It is a well settled principle of federal law that even when federal legislation makes no specific reference to a private right of action, where necessary to give full effect to congressional purpose and intent, the courts will fashion appropriate civil remedies in favor of a plaintiff who is within the class of persons intended to be protected by the legislation and is suffering the type of harm which the legislation was designed to prevent. The bellwether case of *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) is illustrative. In this action it was held that a private right of action existed in favor of a corporate stockholder under §§ 14 (a) and 27 of the Securities Exchange Act of 1934. In answering the defendants' contention that Congress made no specific reference to a private right of action in § 14(a), the court stated:

> "While this language [legislative history] makes no specific reference to a private right of action, among its chief purposes is 'the protection of investor,' which certainly implies the availability of judicial relief where necessary to achieve that result." 377 U.S. at 432.

The court went on to hold:

> "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. . . . It is for the federal courts 'to adjust their remedies

> so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done'." . . . [omitting citation]. 377 U.S. at 433.

Similarly, in *Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031 (9th Cir. 1970), it was held that a discharged employee of the airline had a private right of action pursuant to § 2 of the National Railway Labor Act. As the thrust of § 2 is to make it unlawful for a carrier to interfere with the organization of its employees by unions, the defendant carrier argued that only the union had a remedy under the Act. Further, inasmuch as criminal sanctions were imposed for violations of § 2, it was argued that the criminal remedy was exclusive. In rejecting these contentions, the court first held that since the carrier could effectively prevent the organization of a union by firing employees sympathetic thereto, unless the wrongfully discharged employee himself were allowed to bring action, there would be "a gap in the enforcement of that section which would blunt the effectiveness of the congressional purpose." 433 F.2d at 1033. The court then added:

> "Nor is Burke's remedy limited to institution of criminal proceedings under section 2 (Tenth). In the absence of a clear congressional intent to the contrary the courts are free to fashion appropriate civil remedies based on the violation of a penal statute where necessary to ensure the full effectiveness of the congressional purpose . . .

> Where the interest asserted by the plaintiff is within the class that the statute was intended to protect, the harm of the type the statute was intended to forestall and the statutory criminal penalty inadequate to fully protect the asserted interest, a civil action for damages arises by implication." 433 F.2d at 1033-1034.

The legal principles discussed in *Borak* and *Burke* have now been applied to a wide variety of federal acts. *E.g.*, The National Banking Act, *Deitrick v. Greaney*, 309 U.S. 190, *reh. denied*, 309 U.S. 697 (1940); The Federal Communications Act, *Reitmeister v. Reitmeister*, 162 F.2d 691 (2d Cir. 1947); The Railway Labor Act, *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); The Civil Aeronautics Act, *Fitzgerald v. Pan American World Airways*, 299 F.2d 499 (2d Cir. 1956); The Rivers and Harbors Act, *United States v. Perma Paving Co.*, 332 F.2d 754 (2d Cir. 1964); Hill-Burton Act, *Euresti v. Stenner*, 458 F.2d 1115 (10th Cir. 1972); Wagner-Peyser Act, *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969).

In the instant case there can be no doubt that plaintiffs are the intended beneficiaries of the Clean Air Act, that they are threatened with just the type of harm which the Act sought to prevent, and that court action is necessary to protect their rights. Indeed, the instant case is stronger than either *Borak* or *Burke* because of the citizen suit provision contained in the Act. In the foregoing we have discussed the applicability of subparagraph (a) of § 1857h-2 to the instant case. But even if the narrow, restrictive interpretation of this section urged by Santa Anita were adopt-

ed, we further note the language of subparagraph (e) of § 1857h-2, which provides:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek *enforcement* of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." [Emphasis added].

This language is certainly stronger than that which the Supreme Court relied upon in the *Borak* case to imply a private right of action. Thus, as the court in *Borak* stated:

> " 'The power to *enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.' " 377 U.S. at 433-434. [Emphasis in original].

Finally, *Gomez, supra,* illustrates the applicability of the doctrine of implied private rights of action to legislation which contemplates agency enforcement. Under the Wagner-Peyser Act of 1933 and regulations promulgated by the Secretary of Labor state officials are charged with protecting the interests of migrant farm workers by making sure that employers meet certain job standards. The question presented on appeal was whether or not Gomez, a worker, had a direct private right of action against the state officials and his employer where the job standards were not met.

In holding that private civil remedies were available against both, the court held:

> "There being no explicit indication in the regulations or the Act that the workers were to have the opportunity to protect such conferred interest is not decisive since the existence of such an explicit grant of a remedy is not necessary. A civil remedy may be given to those protected by statutes or regulations by implication." 417 F.2d 575-76.

Further, answering the contention that the only remedy against the state officials rested with the Secretary of Labor by cutting off funds, the court stated:

> "It is unthinking that Congress, obviously concerned with people, would have left the Secretary with only the sanction of cutting off funds to the state. Moreover, the private civil remedy is a method of policy enforcement long honored explicitly in statutes and by implication with the help of courts. Congress more and more commits to individuals, acting as a private Attorney General, the effectuation of public rights through relief to individuals." 417 F.2d at 576.

Likewise, *Fitzgerald* and *Euresti, supra,* illustrate analogous circumstances in which private rights of action were implied where necessary to carry out Congressional intent even though the act in question was supposed to be administered and enforced by an administrative agency.

III.

A Private Right of Action Exists in Favor of Plaintiffs Because the Administrator Refuses to Exercise His Emergency Powers to Restrain Santa Anita From Causing or Contributing to Substantial Endangerment to the Health of Plaintiffs and Others.

Totally independent of plaintiffs' right to enjoin a significant source of pollution that will prevent the attainment and maintenance of primary air quality standards, the emergency powers in the Act provide a basis for plaintiffs' suit because of the refusal of the Administrator to act.

42 U.S.C. § 1857h-1 provides:

Emergency Powers

"Notwithstanding any other provision of this chapter, the Administrator, upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to the health of persons, and that appropriate State or local authorities have not acted to abate such sources, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of such pollution or to take such other action as may be necessary."

The Administrator has failed to exercise his emergency powers presumably because he was unaware of the serious, imminent and substantial danger the potential automobile emissions from Santa Anita's shopping center pose to the lives and health of the thousands of persons in the immediate vicinity. The reason

this information was not available to him was because Santa Anita and the Arcadia City Council did not make such information public at any time.

In response to Santa Anita's argument that plaintiffs should be precluded from urging the emergency provision on appeal because it was not argued when the matter was heard by the trial court, we call to this court's attention that the full extent of the danger making it clear that an emergency situation exists was not known to plaintiffs at the time of the hearing before the district court on November 5, 1973. At that hearing plaintiffs asked for and were granted permission to file the affidavit of a medical epidemiologist as soon as it could be obtained while the matter was under submission. Only upon obtaining the affidavit of Dr. Goldsmith thereafter, filed with the trial court on November 16, did plaintiffs obtain the specific facts with respect to the endangerment of health which make it clear that an emergency situation exists. Thus, these facts were brought to the attention of the trial court and defendants at the earliest possible time and while the case was still under submission. And none of the appellees objected to the filing of the Goldsmith affidavit while the case was under submission.

Finally, it is well settled that an appellate court may in its discretion, in the public interest, or to prevent a miscarriage of justice, consider issues not raised in the trial court. *E.g., United States v. Latrobe Constr. Co.*, 246 F.2d 357, 362 (8th Cir.), *cert. denied*, 355 U.S. 890 (1957).

At the November 5 hearing the trial court stated that it did not dispute the seriousness of air pollution in the vicinity of the proposed shopping center, but that its principal concern was whether plaintiffs were

afforded any judicial remedy under the Act, and that it had all but decided to dismiss the complaint [R. Tr., p. 4]. And in its Memorandum Opinion [Cl. Tr. Vol. I, pp. 136-140] the court made clear that its decision was indeed grounded on the conclusion that in the absence of a plan of implementation or regulations plaintiffs have no judicial remedy under any provision of the Act.

It is apparent, however, that the emergency provision authorized the Administrator to act "notwithstanding any other provision" of the Act. Obviously this means just what it says: that the Administrator could and should restrain the construction and operation of this major new source of motor vehicle emissions even though no implementation plan or regulations have been adopted and solely on the uncontradicted evidence of the harmful effect such emissions will have on thousands of people.

IV.

Relief in the Nature of Mandamus Will Lie to Compel the Administrator to Perform His Duties Under the Act.

28 U.S.C. § 1361 states:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Some courts have read this jurisdictional grant to provide only a remedy subject to all the restrictions of

a traditional mandamus action. *See, e.g., Carter v. Seamans,* 411 F.2d 767, 733 (5th Cir. 1969), *cert. denied,* 397 U.S. 941 (1970). The traditional requirements are that (1) the plaintiff have a clear right to the relief sought, (2) the defendant have a clear duty to perform the act in question, and (3) there be no other adequate remedy available. *Yahr v. Resor,* 339 F.Supp. 964, 967 (E.D.N.C. 1972). The duty at issue must also be "ministerial" rather than discretionary. *United States v. Walker,* 409 F.2d 477, 481 (9th Cir. 1969). Even under this restrictive view of the remedy available under § 1361, plaintiffs are entitled to such relief against the Administrator in this action.

As discussed above, plaintiffs are clearly among the class of people who are entitled to receive the benefits from the performance of the Administrator's duties as required by the Act. The duty of the Administrator is also clear. The Act sets out definite nondiscretionary obligations on his part to provide regulations which will result in attainment and maintenance of the national ambient air quality standards either by approval of a state implementation plan or by promulgation of regulations of his own. Thus, it was held that the Administrator had breached a nondiscretionary duty by not publishing proposed regulations for transportation controls for the Los Angeles region by July 31, 1972. *Riverside v. Ruckelshaus, supra.*

It is not within the Administrator's discretion to choose not to act as all and to permit the further degradation of the air by refusing to review or assess

the impact of major new sources, such as Santa Anita's shopping center. As it is now clear that the Administrator has no intention whatever of reviewing or regulating Santa Anita's project, plaintiffs have no adequate remedy other than by this action.

Moreover, some courts have seen § 1361 as a broader jurisdictional grant to carry out the mandate of § 10 of the Administrative Procedure Act.

> "While the statute is couched in terms of mandamus action, its liberalizing purpose, to remove technical objections that existed outside the District of Columbia, was intended to permit District Courts generally to issue appropriate corrective orders where Federal officials are not acting within the zone of their permissible discretion but are abusing their discretion or otherwise acting contrary to law, and hence to entertain a civil action under § 10 of the Administrative Procedure Act." *Peoples v. United States Department of Agriculture*, 427 F.2d 561, 565 (D.C. Cir. 1970).

Section 10 of the Administrative Procedure Act provides in part:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

The plaintiffs in the present case have suffered legal wrong because of the inaction of the Administrator, and thus should be entitled to judicial review under the Administrative Procedure Act.

V.

Relief in the Nature of Mandamus Will Lie to Compel the City Council for the City of Arcadia to Revoke Permits Issued to Santa Anita and to Compel Appellees Reagan, Maga and Lunche to Perform Obligations Imposed Upon the State of California by the Act.

A federal court has jurisdiction to provide injunctive relief against state and local government entities or officials for violations of federal law. *Shellburne, Inc. v. New Castle County,* 293 F.Supp. 237 (D. Del. 1968). This jurisdiction is not limited to the imposition of negative injunctive relief, but extends as well to positive mandatory relief against state and local officials. *See e.g., United States Servicemen's Fund v. Shands,* 440 F.2d 44 (4th Cir. 1971) (Manager of County Auditorium ordered to permit plaintiff to use auditorium where denial of use was violation of plaintiff's civil rights).

The Act places duties on states, most particularly the duty to prepare, submit and enforce a satisfactory implementation plan. 42 U.S.C. § 1857c-5. The Administrator's regulations specify further responsibilities of the states or their local authorities. *See generally,* 40 C.F.R. Part 51. The fact that the Act does not contain sanctions for noncompliance does not in any way derogate from these duties. Those whom these duties are intended to benefit, therefore, are entitled to bring an action in the nature of mandamus to compel their performance.

VI.

Construction of the Shopping Center Would Be in Violation of the Fourteenth Amendment.

It is undisputed that the concentration of air pollutants in the San Gabriel Valley area is currently many times the federal standards established for the maintenance of public health. It is also undisputed that the effect of Santa Anita's shopping center will be to dramatically raise the concentration of air pollutants in the immediate vicinity and to cause death and serious injury to the health of thousands each year who live or work nearby.

The construction of this nonessential project and the consequent threat to lives in the area are made possible by the issuance of building permits by the Appellee City of Arcadia. In issuing such permits, the City ignored known standards of ambient air quality and failed to consider the adverse impact on the public health of its citizens through motor-vehicle-related air pollution.

Thus the Agencies through inaction and appellee City through issuance of building permits are responsible for endangering the lives, health and safety of plaintiffs, all in violation of the Fourteenth Amendment to the United States Constitution.

VII.

The Trial Court Erroneously Concluded That the Complaint Does Not State a Claim Upon Which Relief Can Be Granted.

As discussed above, pages 17-18, Congress clearly intended to encourage private citizen suits as an added arm of enforcement. Further, as is shown, page 17, the national primary ambient air quality standards

are emission standards or limitations which can be enforced by private citizens pursuant to 42 U.S.C. § 1857h-2. The trial court erroneously concluded that the citizen suit provision could be employed only to enforce regulations promulgated by the Administrator [Cl. Tr. Vol. I, p. 138]. In so holding it apparently did not even consider the question of whether or not the primary ambient air quality standards, which are the bedrock of the entire legislative scheme, are enforceable under the citizen suit provision.

Further, adoption of the trial court's reasoning would leave a gaping loophole in the citizen suit provision in contravention of congressional intent. For if it is clear that citizens may bring private actions to enforce regulations promulgated by the Administrator as an added means of enforcing the Act, by the stronger reasoning it is also clear that citizens have a right to bring private actions to enforce the Act where the Administrator has not even promulgated the regulations required by the Act in the first place. Under such circumstances, all the more reason, and the more necessity, for private citizens suits.

Moreover, the trial court's opinion that plaintiffs have no judicial remedy in the absence of a plan of implementation or regulations is contrary to an opinion of the Attorney General for the State of California rendered on December 18, 1973, six days after the trial court's decision. In response to an inquiry from Appellee Maga, Executive Officer of the California Air Resources Board, the Attorney General concluded:

> "California's air pollution control districts presently are authorized to regulate complex sources of air pollution for the purpose of denying authori-

> ty to construct such sources where the emissions indirectly generated by such sources would prevent the attainment or maintenance of federal or state air quality standards." Op. Atty. Gen. SO 73-43.

Had Appellee Maga's counsel, the Attorney General, advised the trial court of his impending formal opinion (published Jan. 4, 1974) the trial court might logically have concluded that plaintiffs did have a judicial remedy under applicable law governing the state agency defendants. One can only assume that had the Attorney General's opinion been supportive of the trial court's position, counsel for Appellee Maga would have brought the same to the attention of the trial court.

The trial court also neglected to consider, or even discuss, the well settled principle of federal law that even where federal legislation does not explicitly set forth civil remedies for private individuals, when necessary to insure the full effectiveness of congressional intent the courts will imply a private right of action where Congress intended to protect the interest asserted by the plaintiff and the harm being done is of the type which the statute intended to forestall. Neither the cases cited by plaintiffs nor the applicability of the principle for which they stand are discussed in the trial court's opinion.

The trial court also erroneously held that plaintiffs' action against the Administrator was premature, and in effect concluded that the Administrator was under no obligation to promulgate regulations relating to complex sources in the Los Angeles area until December 15, 1973. The trial court reasoned that the deadline of July 31, 1972, the date mandated by § 1857c-5 for promulgation of all state implementation plans or fed-

eral regulations, was superseded and further extended by judicial fiat in *National Resources Defense Council v. Environmental Protection Agency,* 475 F.2d 968 (D.C. Cir. 1973). The court also erroneously concluded that this decision for the first time created the requirement that "complex sources" be regulated.

These conclusions misread the Act and the *Natural Resources* decision. The Act itself quite clearly establishes the timetable which required the Administrator to promulgate regulations by July 31, 1972. Contrary to the interpretation of the trial court in its Memorandum Opinion, the court in *Natural Resources* made it clear that the Act did not authorize the Administrator to delay promulgation of transportation controls and that in so doing he had acted "unlawfully". Thus, the timetable which the court set up for promulgation of the long overdue regulations did not alter the fact that the Administrator was in violation of the Act for his failure to promulgate these regulations earlier.

Moreover, although the Administrator was slow to recognize it, the Act itself (not the decision in *Natural Resources*) clearly requires control over "complex" or "indirect" sources such as the Santa Anita shopping center. As he finally acknowledged, compliance with the clear mandate of the Act required "provisions which will permit the review, and provide the authority to prevent, the construction, modification, or operation of complex sources at a location where emissions associated with such source would result in violation of a national standard or the State's control strategy." 38 Fed. Reg. 6279, March 8, 1973.

The trial court, enmeshed in this tangle of dates and court decisions, also missed the thrust of plaintiffs' con-

tentions on this point. Plaintiffs do not seek an order establishing yet another timetable for the promulgation of long awaited, long overdue regulations. Nor do they quarrel with the deadlines which have been imposed in *Riverside* and *Natural Resources*. But rather, plaintiffs assert that Santa Anita's project, destructive to the health and well-being of thousands of citizens, should be stopped until such time as the Agencies perform their obligations under the Act by promulgating and applying to this project regulations which will insure attainment and maintenance of the national primary ambient air quality standards.

The need for court action is highlighted by the inadequacy of the "indirect" source regulations finally promulgated by the Administrator in February of this year. 39 Fed. Reg. 7269, Feb. 25, 1974. These regulations will apply only to indirect sources *commenced after* January 1, 1975. As these regulations will not apply to the Santa Anita project commenced much earlier, the Administrator is still in violation of the Act for having failed to promulgate regulations covering projects now under construction which are known sources of pollution, and which, as in the instant case, will prevent attainment or maintenance of primary standards.

A source of pollution gains no vested right to pollute because regulations take effect after it has been commenced. To the contrary the Act clearly contemplates that regulations will be applied to existing sources. *See, e.g.*, 42 U.S.C. § 1857c-6(d); § 1857c-7(c).

VIII.

No Bond Should Be Required of Plaintiffs as a Condition for the Issuance of the Injunction.

Where plaintiffs have sought compliance with either the National Environmental Policy Act or California Environmental Quality Act no bond has been required of them as a condition to obtaining an injunction halting construction. None was required, or only a nominal bond, in the following cases:

Natural Resources Defense Council v. Morton, 337 F.Supp. 167, 3 E.R.C. 1473 (D.D.C. 1971): $100 bond;

Friends of Mammoth v. Mono County Board of Supervisors, 8 Cal.3d 247 (1972): no bond;

Keith v. Volpe, 352 F.Supp. 1324 (C.D. Cal. 1972); no bond;

Environmental Defense Fund, Inc. v. Corps of Engineers, 331 F.Supp. 925 (D.D.C. 1971): $1 bond (Tennessee-Tombigbee Waterway);

Environmental Defense Fund, Inc. v. Corps of Engineers, 324 F.Supp. 878 (D.D.C. 1971): $1 bond;

West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 236 (4th Cir. 1971): $100 bond;

Wilderness Society v. Hickel, 325 F.Supp. 422 (D.D.C. 1970): $100 bond (Trans-Alaska Pipeline).

The court in *NRDC v. Morton, supra,* although noting that federal judges have great discretion with respect to requiring bonds, held that requiring such bonds

would stifle the intent of NEPA. The court added that public interest would be far more gravely damaged by the failure of the courts to rigorously and consistently enforce NEPA than by any damage to defendants. And in this case, to compare the endangered health and lives of thousands of affected residents with the financial investment of the owners and developers of the shopping center would be a grotesque exercise.

Conclusion.

As it is clear from the allegations of that complaint and the supporting affidavits of Behar and Goldsmith that plaintiffs have a private right of action under the Act against Santa Anita and the Agencies, it is respectfully submitted that the decision of the trial court dismissing the complaint for failure to state a claim should be reversed, and the case should be remanded to the trial court for trial on the merits. In addition, it is respectfully submitted that based upon the showing made by plaintiffs, the trial court's denial of plaintiffs' application for a preliminary injunction should also be reversed.

By the unlawful and unjustified failure of the Agencies to perform their duties under the Act, and by Santa Anita's callous disregard for the lives, health and safety of plaintiffs, appellees have thrown the gauntlet at the feet of this court. In a similar context, the Court of Appeals for the District of Columbia answered the challenge where Judge Skelly Wright wrote:

> "Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material 'progress'. [footnoting to the Clean Air Act as well

> as other environmental legislation]. But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role . . . Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Com'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

We urge this court to accept the challenge in the instant case. Otherwise, it is clear that as to plaintiffs the Act will remain as it has been since it was passed —a literary monument to the good intentions of the United States Congress but of no meaning to the citizens whom it was intended to protect and benefit. Like Shakespeare's description of life—"Full of sound and fury, signifying nothing."

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EXHIBIT A.

Riverside v. Ruckelshaus, U.S. District Court, Central District of California.

City of Riverside; City of San Bernardino; The Regional Antipollution Authority, a joint-powers agency; Desert People United, a nonprofit corporation; Edward Mehren, and Christopher J. Diebenkorn v. William D. Ruckelshaus, as Administrator, Environmental Protection Agency. No. 72-2122-IH, November 16, 1972.

Full Text of Opinion

HILL, J.:

The above cause came on regularly for hearing on October 30, 1972 and November 6, 1972, upon plaintiffs' Motion for Preliminary Injunction and defendant's Motion to Dismiss and Motion to Stay; the Court, with the agreement of counsel for all parties, invoked Rule 65(a) (2) of the Federal Rules of Civil Procedure; and the Court after hearing the evidence and having considered said motions, affidavits and memoranda with respect thereto, and having heard the arguments of counsel, now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs filed a Complaint on September 6, 1972, for a preliminary and permanent injunction and a mandamus order pursuant to Title 5, United States Code, Section 702 and Title 28, United States Code, Sections 1331, 1337 and 1361 claiming that defendant, William D. Ruckelshaus, as Administrator of the Environmental Protection Agency, had breached a nondiscretionary duty imposed upon him by Section 110 of the Clean Air Act of 1970, 42 U.S.C. § 1857c-5,

and seeking to have this Court order the defendant to prepare and publish an implementation plan for the South Coast Air Basin showing that the national primary ambient air quality standards for nitrogen oxides, particulates and photochemical oxidants will be met in the Basin within the time prescribed by law. The Complaint also sought reasonable attorneys' fees.

2. Plaintiffs filed a Motion for Preliminary Injunction on September 6, 1972, requesting that the defendant, Administrator, be enjoined immediately to prepare and publish such an implementation plan for the South Coast Air Basin.

3. Attached by plaintiffs to the Motion for Preliminary Injunction were the affidavits of eight residents of the South Coast Air Basin, including medical doctors, indicating that air pollution in the Basin is presently a severe problem, that adverse health effects have resulted therefrom, and that plaintiffs had actively sought solutions to the problem and were injured by the Administrator's failure to propose an implementation plan.

4. On October 6, 1972, the United States, on behalf of the Administrator, moved to dismiss the action on the ground that the Court lacks jurisdiction because the plaintiffs did not give notice to the Administrator 60 days prior to initiating the action, as required by Section 304(b) (2) of the Clean Air Act of 1970, 42 U.S.C. § 1857h-2(b)(2), and regulations pursuant thereto.

5. The United States, on behalf of the Administrator, moved on October 13, 1972, to stay the action on the grounds that the Administrator had already fulfilled many of the responsibilities to which the Com-

plaint was directed and had publicly committed himself to fulfill the balance of those responsibilities by February 15, 1973; attached to the motion of defendant to stay the action was the affidavit of Mr. Irwin Auerbach, Director of Program Planning and Review, Office of Air and Water Programs, United States Environmental Protection Agency.

6. At a hearing on the motion of plaintiffs for a preliminary injunction and on the motions of defendant to dismiss or, alternatively, to stay this action, the Court received the testimony of Mr. David Souten, an employee of Region IX of the United States Environmental Protection in San Francisco, California, whose work responsibility is to review and propose necessary modifications to the implementation plan submitted by the State of California to the Environmental Protection Agency pursuant to Section 110 of the Clean Air Act of 1970, 42 U.S.C. § 1857c-5; Mr. Souten is an engineer with considerable experience in the field of air pollution control.

7. On or about February 23, 1972, the Administrator received from the State of California an implementation plan to achieve the Federal national ambient air quality standards within the various air quality control regions in California.

8. On May 31, 1972, the Administrator announced his disapproval of large portions of the California plan.

9. Certain regulations proposed by the Administrator on September 22, 1972, to correct deficiencies in the California implementation plan (37 Fed. Reg. 19812-19815, 19829-19835) apparently completed the plan with respect to the South Coast Air Basin (i.e.,

the Metropolitan Los Angeles Intrastate Air Quality Control Region) for meeting the particulate and nitrogen oxide Federal national ambient primary standards by July of 1975, but did not set forth the necessary transportation controls to meet the photochemical oxidant standard.

10. The Administrator subsequently announced in the Federal Register of September 22, 1972, that he would propose appropriate transportation controls for the Metropolitan Los Angeles region by February 15, 1973.

THE CLEAN AIR ACT OF 1970

11. The Clean Air Act of 1970 created a new federal program "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population . . ." 42 U.S.C. § 1857(b)(1). The Act requires each state to adopt an implementation plan specifying the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such state within three years from the approval of such plan. If a state fails to submit a satisfactory implementation plan, the Act requires the Administrator to develop such a plan, and he has broad authority to enforce an implementation plan with civil and criminal penalties.

12. The Clean Air Act establishes firm deadlines for actions to be taken by a state and by the Administrator in furtherance of the goal of clean air.

(a) Within 30 days after December 31, 1970, the Administrator of EPA was required to publish proposed regulations prescribing national pri-

mary and secondary ambient air quality standards for each pollutant for which air quality criteria had been issued. On January 31, 1971 air quality criteria had been issued for carbon monoxide, sulfur dioxide, nitrogen oxides, particulates and photochemical oxidants.

(b) Within 90 days after publication of the proposed regulations, the Administrator of EPA was required to promulgate by regulation the proposed primary and secondary air quality standards "with such modifications as he deems appropriate." 42 U.S.C. § 1857c-4(a)(1)(B).

(c) Within nine months after promulgation of the standards, each state was required to submit to the Administrator of EPA an implementation plan providing for achieving the national primary air quality standards in each air quality region. 42 U.S.C. § 1857c-5(a)(1).

(d) Within four months after the date of submission of such an implementation plan, the Administrator was required to approve or disapprove it. 42 U.S.C. § 1857c-5(a)(2).

(e) The Administrator was entitled to approve a state implementation plan only if he found that it provided for the achievement of national primary ambient air quality standards "as expeditiously as possible, and in no case later than three years from the date of approval of such plan." In order to meet the statutory target date, the state plans were required to include emissions limitations, schedules and timetables for compliance, and "such other measures as may be necessary to insure attainment and maintenance of such

primary or secondary standard, including, but not limited to, land use and transportation controls." 42 U.S.C. § 1857c-5(a)(2)(B).

(f) Section 110(c) of the Clean Air Act, 42 U.S.C. § 1957c-5(c), provides in pertinent part as follows:

> "The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—
>
> (2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section.
>
> The Administrator shall, within six months after the date required for submission of such plan . . ., promulgate any such regulations unless, prior to such promulgation such State has adopted a plan . . . which the Administrator determines to be in accordance with the requirements of this section."

Thus, the Act requires that the Administrator promulgate regulations to replace any portion of a state plan he disapproves within two months of the date of disapproval: In this case by July 31, 1972.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter.

2. Plaintiffs admittedly failed to give the Administrator 60 days notice before filing this action, as required by subsection 304(a)(2) of the Clean Air Act of 1970, 42 U.S.C. § 1857h-2(a)(2). The Court concludes that the provisions of subsection (e) of that section do not apply in this case, since this is a suit against the Administrator to compel him to perform a non-discretionary duty under the Act and therefore covered by subsection (a)(2). Although this construction would give the Administrator an additional 60 days after each of the firm deadlines set by Congress in which to perform the various non-discretionary duties imposed under the Clean Air Act, the statutory language appears to require this result.

[1] 3. There has been substantial compliance and actual constructive compliance by plaintiffs with the sixty-day notice provision, 42 U.S.C. § 1857h-2(b)(2), in that:

1) Filing of the complaint herein on September 6, 1972 and personal service of the complaint on the Administrator constituted actual notice of the plaintiffs' demand for action by the Administrator.

2) Sixty days elapsed between the filing date and the date that hearing on plaintiffs' request for injunction was complete and this Court rendered its judgment.

3) During that sixty day period the Administrator had all the beneficial effect of the sixty day notice provision, so the purposes of the provision were fulfilled.

4) During the sixty day period in which this action has been pending, the Administrator not only failed to promulgate the plan as requested by plaintiffs, he reiterated in the Federal Register of September 22, 1972 his intention not to do so until February 15, 1973.

[2] 4. By not publishing proposed regulations for transportation controls for the Metropolitan Los Angeles Intrastate Air Quality Control Region by July 31, 1972, the Administrator breached a non-discretionary duty under the Clean Air Act of 1970, 42 U.S.C. § 1857c-5(c).

5. None of the justifications or excuses for delay alleged by the Administrator are valid under the statute.

6. Judgment for plaintiffs is granted on the merits, and the defendant is ordered to prepare and publish in the Federal Register by no later than January 15, 1973, regulations setting forth an implementation plan for attaining the national primary ambient air quality standard for photochemical oxidants in California, including all necessary transportation controls and land use controls. Such proposed regulations shall demonstrate that the national primary standard for photochemical oxidants shall be attained within three years of the date of final adoption, or, if a request for a two-year extension is or has been made by the Governor of California and thereafter approved by the Administrator pursuant to § 1857c-5(c)(1) of the Clean Air Act, no later than five years from the date of adoption.

7. The court declines to award plaintiffs costs or attorneys' fees since the action is one against the U.S. Government.

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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-398

PLAN FOR ARCADIA, INC., a non-profit corp.,

Petitioner,

vs.

ANITA ASSOCIATES, SANTA ANITA CONSOLIDATED, INC., RUSSELL TRAIN, as Administrator, Environmental Protection Agency, RONALD REAGAN, Governor of the State of California, JOHN MAGA, Executive Officer, California Air Resources Board, ROBERT G. LUNCHE, Acting Air Pollution Control Officer for Los Angeles County Air Pollution Control District and CITY OF ARCADIA CITY COUNCIL,

Respondents.

Brief of Respondents Governor Reagan and Executive Officer Maga in Opposition to Petition for Writ of Certiorari

Preliminary Statement

Petitioner, Plan for Arcadia, Inc., commenced this action to enjoin further construction and operation by the non-governmental respondents of a regional shopping center in the City of Arcadia, State of California. Petitioner asserts that the shopping center is being constructed in violation of the Clean Air Act of 1970 (42 U.S.C. § 1857 *et seq.*) in that it constitutes a com-

plex source of air pollution which will prevent attainment and maintenance of federal ambient air quality standards.

Additionally, petitioner seeks mandamus relief against the Administrator of the Environmental Protection Agency, the Governor of the State of California, the Executive Officer of the California State Air Resources Board, the Los Angeles County Air Pollution Control Officer, and the Arcadia City Council.

This brief in opposition to the petition for writ of certiorari is submitted solely on behalf of respondents Ronald Reagan, Governor of the State of California, and John Maga, former Executive Officer of the California State Air Resources Board (hereinafter referred to as "state respondents").

In the proceedings below, the District Court held, and the Court of Appeals affirmed, that the exclusive authorization for bringing a private civil suit under the Clean Air Act is section 304 (42 U.S.C. § 1857h-2), and that petitioner had failed to state a cause of action thereunder. As both courts recognized, section 304 provides no right of injunctive relief against non-governmental parties except for violation of specific standards, limitations, or orders promulgated under the Act, and no right to mandamus relief against non-federal governmental officials for a failure to act. The only mandamus action authorized under section 304 is against the Administrator of the Environmental Protection Agency, and then only for failure to perform nondiscretionary acts or duties.

Plan for Arcadia, Inc. contends in its petition for writ of certiorari that because the State of California did not submit an acceptable implementation plan pur-

suant to 42 U.S.C. § 1857c-5(a)(1), and because the Administrator thereafter failed to adopt a plan on its own as required by 42 U.S.C. § 1857c-5(c)(3), petitioner may bring a private action for injunctive relief against the non-governmental respondents. (Petnr. Br., p. 13.)

As to state respondents, petitioner seeks a writ of mandate compelling state respondents to "adopt and submit to the Administrator a plan for implementation" in conformity with federal ambient air quality standards, and to "enjoin and restrain construction or operation of the shopping center and parking lots until such plan has been approved by the Administrator." [Cl. Tr. p. 14.]

It is respectfully submitted that, for the reasons set forth below, petitioner has no private right of action, either express or implied, under which it can compel state respondents to submit an implementation plan or require them to enjoin the non-governmental respondents from construction or operation of the shopping center.

ARGUMENT

I

The Clean Air Act Creates No Judicial Remedy to Compel State Respondents to Adopt and Submit an Adequate Implementation Plan

Petitioner's action is purportedly brought pursuant to section 304 of the Clean Air Act of 1970 (42 U.S.C. § 1857h-2), which authorizes private civil actions by "any person" against "any person . . . who is alleged to be in violation of an emission standard or limitation." 42 U.S.C § 1857h-2(a)(1).

Petitioner does not allege that state respondents were or are "in violation of an emission standard or limitation." Rather, as noted above, petitioner's purported cause of action against state respondents is that the State of California has failed to comply with section 110 of the Clean Air Act (42 U.S.C. § 1857c-5), which requires a state to adopt and submit to the Administrator "a plan for implementation, maintenance and enforcement" of national ambient air quality standards adopted by the Administrator. [Petnr. Br., p. 13, Cl. Tr. p. 11.]

State respondents readily concede that the Clean Air Act places initial responsibility upon the states for devising implementation plans. It is respectfully submitted, however, that the Act provides no judicial remedy to compel state respondents to adopt and submit such a plan. Rather, the Clean Air Act provides that the Administrator shall prepare, publish, and adopt on his own an implementation plan for any state that fails to adopt a plan, or that submits an unacceptable plan. Clean Air Act § 110(c); 42 U.S.C. § 1857c-5(c).

The public interest in enforcing the Clean Air Act is thereby safeguarded by investing the Administrator with the duty to "impose" an implementation plan upon a state in non-compliance with the Act. Should the Administrator, as petitioner alleges, fail to impose an implementation plan, a mandamus action may be brought to require promulgation. In fact, at the time petitioner filed this action, the Administrator was already acting pursuant to such a mandate. *See Riverside v. Ruckelshaus*, 4 E.R.C. 1728 (C.D. Cal. 1972).

It is clear, however, that no cause of action may be pleaded under section 304 for an order compelling a state to submit a plan, nor under any other statute or law cited by petitioner. Federal mandate provisions are applicable only against federal agencies and officials. 28 U.S.C. § 1361. The same is true of the federal Administrative Procedure Act. 5 U.S.C. §§ 701-06.

Petitioner cites two cases (Petnr. Br., App., p. 37) for the proposition that the court has jurisdiction to grant injunctive relief against state respondents. Neither case, however, is supportive of petitioner's position. Both *Shellburne v. New Castle County*, 293 F.Supp. 237 (D. Del. 1968), and *United States Servicemen's Fund v. Shands*, 440 F.2d 44 (4th Cir. 1971), involved the federal Civil Rights Act. However, that Act expressly provides that relief is available "in an action at law, in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. As noted, section 304 of the Clean Air Act (42 U.S.C. § 1857h-2) permits private actions only against persons creating emissions in excess of emission standards or limitations, or against the Administrator. It does not provide for equitable relief against non-federal governmental officials.

II

No Cause of Action Exists to Compel State Respondents to Halt Construction or Operation of the Shopping Center

Petitioner also seeks an order requiring state respondents to take action to halt construction and operation of the shopping center until an implementation plan for California is approved by the Administrator of the Environmental Protection Agency. [Cl. Tr. p. 14.]

What Plan for Arcadia, Inc. appears to request is a mandatory injunction requiring state respondents to institute legal proceedings against the non-governmental respondents. It is submitted that no cause of action exists to require a public official to institute such litigation.

A mandatory injunction is in effect equivalent to a writ of mandamus and is normally governed by like considerations. *Miguel v. McCarl,* 291 U.S. 442, 452 (1934); *McCarthy v. Watt,* 89 F.Supp. 841, 842 (D. Mass. 1950); *New York Technical Institute of Maryland v. Limburg,* 87 F.Supp. 308, 313 (D. Md. 1949).

In this regard, the courts have uniformly refused to issue writs of mandate to compel law enforcement agencies to institute prosecutorial activities for the reason that the decision to undertake prosecution is entirely within the discretion of the agency and not subject to control by way of mandamus. *Petition of A & H Transportation, Inc.,* 319 F.2d 69, 71 (4th Cir. 1963), *cert. denied* 375 U.S. 924 (1963); *Moses v. Kennedy,* 219 F.Supp. 762, 765-66 (D. D.C. 1963); *Morgan v. Null,* 117 F.Supp. 11, 15 (S.D. N.Y. 1953); *Wilson v. Sharp,* 42 Cal.2d 675, 678-79 (1954); *Ascherman v. Bales,* 273 Cal.App.2d 707,

708 (1969); *City of Campbell v. Mosk*, 197 Cal.App. 2d 640, 647 (1961).

It should also be noted that mandatory injunctions are rarely granted and only in a very urgent case where a clear entitlement to issuance is demonstrated. *O'Malley v. Chrysler Corporation*, 160 F.2d 35, 36 (7th Cir. 1947).

The present action, however, is not such a case. Plan for Arcadia, Inc. fails to indicate in its petition for writ of certiorari that the Administrator, having promulgated an implementation plan for California, including a regulation entitled "Management of Parking Supply," is now fully in compliance with the requirements of the Act. *See* 38 Fed. Reg. 31232 (November 12, 1973) as amended by 39 Fed. Reg. 1025 (January 4, 1974) and 39 Fed. Reg. 1848 (January 15, 1974). While the Administrator deferred the effective date of regulation until January 1, 1975, this suspension of the Clean Air Act timetable has been expressly authorized by Congress in section 4(b) of the Energy Supply and Environmental Coordination Act of 1974. 88 Stat. 246, 1974 U.S. Code Cong. and Admin. News 1663, 1675.

Thus, not only has the matter of compelling state respondents to submit an implementation plan become moot, but it would appear that in view of the authorization contained in section 4(b) of the Energy Supply and Environmental Coordination Act of 1974, state respondents are precluded by statute from bringing an action to enjoin construction or operation of the shopping center.

Conclusion

It is readily apparent that no cause of action exists as against state respondents. Rather, given the Administrator's promulgation of a California implementation plan, together with regulations governing projects of the nature involved herein, it is clear that the shopping center is being constructed and operated in full compliance with the requirements of the Clean Air Act.

For the foregoing reasons, state respondents respectfully urge this court to deny petitioner's request for writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-398

PLAN FOR ARCADIA, INC., a non-profit corporation,
Petitioner,

vs.

ANITA ASSOCIATES, SANTA ANITA CONSOLIDATED, INC., RUSSELL TRAIN, as Administrator, Environmental Protection Agency, RONALD REAGAN, Governor of the State of California, JOHN MAGA, Executive Officer, California Air Resources Board, ROBERT G. LUNCHE, Acting Air Pollution Control Officer for Los Angeles County Air Pollution Control District and CITY OF ARCADIA CITY COUNCIL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondents Anita Associates and Santa Anita Consolidated, Inc. in Opposition to the Issuance of the Writ.

Pursuant to Rule 24 of the Rules of the Supreme Court, respondents Anita Associates and Santa Anita Consolidated, Inc. ("Santa Anita") oppose the issuance of a writ of certiorari in the above-entitled case for the reasons set forth in this brief.

JURISDICTION AND STATUTES INVOLVED.

Petitioner correctly states the basis of this Court's jurisdiction and correctly cites the constitutional and statutory provisions applicable to the questions raised by this petition, except that petitioner does not cite or set forth Sections 1857c-5 and 1857c-6 of Title 42 of the United States Code or 88 Stat. 246 (1974) (not yet codified), which are set forth in pertinent part in Appendix A hereto.

QUESTIONS PRESENTED FOR REVIEW.

In attempting to set forth issues worthy of this Court's attention, petitioner limits itself to two contentions. First, petitioner complains of the refusal of the Court of Appeals to entertain its argument, raised for the first time on appeal, that mandamus should issue to compel the Administrator of the Environmental Protection Agency to exercise his emergency powers under the Clean Air Act. Second, petitioner contends that a private cause of action exists under the Clean Air Act to enforce ambient air quality standards even in the absence of implementing regulation. These respondents will treat these contentions in reverse order to facilitate logical and concise argument.

STATMENT OF THE CASE.

A. Nature of the Case.

In the proceedings below, petitioner[1] sought principally to prevent the development of Santa Anita Fashion Park ("Fashion Park"), a shopping center, by respondent Anita Associates.[2] To this end, petitioner sought a temporary restraining order and a preliminary injunction against these respondents and a writ of mandate addressed to the public entity respondents herein requiring them to take steps to halt the challenged developments. Petitioner based its prayer primarily upon allegations that the developments at issue were in violation of the Clean Air Act as amended [42 U.S.C. § 1857 *et seq.* (1970).]

Anita Associates and Santa Anita will address themselves principally to the merits of petitioner's contentions concerning the requirements of the Clean Air Act. Factually, Anita Associates and Santa Anita contended vigorously below that Fashion Park will reduce rather than increase air pollution in the San Gabriel Valley.[3] For purposes of this petition, of course, these

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[1]Originally, there were two plaintiffs in this action, petitioner and an individual named Jack Saelid. Mr. Saelid withdrew, however, following the decision of the Ninth Circuit affirming the dismissal of this action, pursuant to leave to withdraw granted by the Court of Appeals by order dated August 28, 1974.

[2]Secondarily, petitioner sought to prevent the construction of a new parking lot off Baldwin Avenue for Santa Anita racetrack by appellee Santa Anita. The Baldwin Avenue Parking Lot, except for landscaping, was complete and had been open to the public for nearly two months by the time this action was filed. It is now entirely complete, and petitioner does not appear to continue to challenge this development.

[3]Indeed, the evidence before the District Court on the beneficial regional, as opposed to local, impact of Fashion Park was uncontested. Shopping centers are attractive to the consumer

(This footnote is continued on next page)

factual contentions are irrelevant because the Act itself does not prohibit the development at issue; and, even if it did, petitioner lacks standing under the Act to challenge the development.

B. The Proceedings Below.

Petitioner filed its complaint herein in the United States District Court for the Central District of California and applied for a temporary restraining order on October 23, 1973. [Clerk's Transcript ("C.T."), Vol. I, p. 1] Following a brief hearing in the chambers of the Honorable Jesse W. Curtis on October 24, 1973, the application was denied, but November 5, 1973, was set for a hearing on appellants' motion for preliminary injunction. When this matter came on for hearing, however, Judge Curtis indicated that the matter seemed ripe for summary judgment and proposed that it be treated in that fashion. [Reporter's Transcript ("R.T."), p. 4]. The parties present or represented by counsel at that hearing—petitioner Plan for Arcadia and then-plaintiff Jack Saelid and respondents

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who will often seek them out even if substantial driving distances are involved. At present, few such centers are located in the San Gabriel Valley so that shopping trips often involve long trips to distant centers. The location of Fashion Park in the San Gabriel Valley will alter this pattern, enabling the residents of that area to make fewer and shorter trips. It is anticipated that 100,000 passenger vehicle miles per day will be eliminated, eliminating as well the motor vehicle emissions associated with this travel. The overall result of Fashion Park, therefore, will be improvement of the air quality in the San Gabriel Valley. [Affidavit of Donald Frischer and Joint Affidavit of John Dunzer, Vincent Mestre and G. S. Samuelson, C.T., Vol. II, pp. 76-79, 99-103.]

Santa Anita, Anita Associates and Russell Train, Administrator of the Environmental Protection Agency—stipulated to this procedure and the matter was so submitted. On November 16, 1973, pursuant to previously obtained leave of Court, petitioner submitted an additional affidavit in support of its position. [C.T., Vol. I, p. 129.] On December 12, 1973, Judge Curtis issued his memorandum opinion denying petitioner's motion for preliminary injunction and dismissing the complaint. [C.T., Vol. I, p. 136.]

On January 7, 1974, appellants unsuccessfully moved the District Court for an injunction pending appeal. [R.T. p. 36.] At that time, in an effort to make this matter ripe for appeal as quickly as possible, petitioner urged the District Court not to prepare and file findings of fact and conclusions of law. Respondents Anita Associates and Santa Anita believed such findings and conclusions to be required by Fed.R.Civ. P. 50 inasmuch as the matter had initially been submitted as a motion for preliminary injunction. [R.T. pp. 37-40.] Anita Associates and Santa Anita withdrew their request for findings and conclusions, however, in return for petitioner's stipulation waiving any procedural defects which might exist in the manner in which judgment had been reached. [C.T., Vol. I, p. 156.]

C. Summary of Relevant Facts.

1. Fashion Park.

On April 30, 1970, Santa Anita filed with the City of Arcadia ("City") a zone change application to permit the development of a regional shopping center to be known as Santa Anita Fashion Park.[4] The development was to include three major department stores and approximately seventy mall stores.

The Planning Commission of the City held extensive public hearings on this application. The evidence received included discussion of planning, economic, traffic, social, environmental and aesthetic matters. On February 5, 1971, the City Council adopted a resolution placing on the ballot as a referendum the question of whether the zoning change should be adopted to permit the development of Fashion Park. The zoning change itself was, if approved in the referendum, to be subject to a number of detailed conditions, which were

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[4]The majority of the facts in this statement find their support in the Findings of Fact and Conclusions of Law signed by the Honorable Joseph A. Sprankle in an earlier case under the California Environmental Quality Act involving petitioner and the private respondents herein, *Plan for Arcadia v. City of Arcadia City Council, et al.*, in the Superior Court of the State of California for the County of Los Angeles. The judgment therein, adverse to petitioner, was affirmed on October 28, 1974, by the Court of Appeal of the State of California for the Second Appellate District.

A copy of Judge Sprankle's Findings and Conclusions is attached to the Affidavit of James W. Colbert, III. [C.T., Vol. II, p. 1.] Unless otherwise noted, all factual assertions will find support in this document. Judge Sprankle's findings were based upon declarations filed in that action and upon the administrative record of proceedings before the City Council of the City of Arcadia. The District Court took judicial notice of the administrative record to the extent that Judge Sprankle's Findings were based upon declarations, Anita Associates and Santa Anita presented supporting affidavits to the District Court. [C.T., Vol. I, p. 63; Vol. II, pp. 69, 80, 86, 92, 95.]

presented to the electorate with the same ballot sent to all registered voters. On April 20, 1971, the voters of the City of Arcadia approved the proposition.

On April 6, 1972, Santa Anita leased the site for Fashion Park to Anita Associates, and Anita Associates submitted preliminary plans to the City Council for approval. On August 15, 1972, these plans were approved.

2. Construction Prior to the Initiation of This Action.

Anita Associates applied for a grading permit for the Fashion Park site on February 26, 1973. The Director of Public Works held up the issuance of that permit, however, requesting that Anita Associates provide the City with data to assist in the preparation of an environmental impact report for the development. On March 12, 1973, following public hearings, the Planning Department submitted to the City Council, with a copy of petitioner Plan for Arcadia, a document entitled Environmental Impact Report. On March 20, 1973, the City Council approved the report for Fashion Park; and, on March 21, 1973, the City issued a grading permit for the Fashion Park site. Anita Associates began work soon thereafter.

On June 6, 1973, Anita Associates obtained a foundations-only building permit from the City of Arcadia for the commencement of construction of Fashion Park. Ground was broken and the first footings poured and rebar work began that same day. The foundations were completed on October 26, 1973. [Affidavit of Ernie Weber, C.T., Vol. I, p. 63.]

A full building permit was obtained on July 10, 1973. Masonry work began on July 26, 1973, miscellaneous metal work on August 1, 1973, electrical work

on September 5, 1973, plumbing on September 12, 1973. Work on elevators and escalators began on September 10 and 11, 1973, respectively. Structural steel work began on October 17, 1973. [Affidavit of Ernie Weber, C.T., Vol. I, p. 63.]

Off-site improvements on the adjoining streets, paid for by Anita Associates, began on June 8, 1973. They were substantially completed on September 28, 1973. [Affidavit of Ernie Weber, C.T., Vol. I, p. 63.]

ARGUMENT.

A. INTRODUCTION TO CLEAN AIR ACT CONCEPTS.

The Clean Air Act, enacted in 1963 and amended in 1967 (the "1967 amendments") and in 1970 (the "1970 amendments"), created a unique system of regulation for the improvement and control of air quality throughout the United States. The Act mandates cooperation between state and federal authorities in a complex and often confusing manner that is largely unparalleled in other legislation. Intelligent discussion of the Act and its scope necessarily requires as background a brief history of the Act and a rapid sketch of its regulatory approach.[5]

1. The Clean Air Act Under the 1967 and 1970 Amendments.

The Clean Air Act has its historical genesis in legislation enacted in 1963 as an incentive to research and study of the air pollution problems of the nation and as an aid to state enforcement of pollution controls through limited federal participation in enforcement. 77 Stat. 392. More important, however, were the 1967 amendments (known as the Air Quality Act of 1967 [81 Stat. 485]) which resulted in major changes in the Clean Air Act and provided the conceptual basis of the present regulatory approach. Finding air pollution control to be properly a matter principally of state and local responsibility (42 U.S.C. § 1857), Congress took an approach that left the states almost solely in control of setting standards, of devising plans for meeting those

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[5]A general treatment of this topic can be found in *The Clean Air Amendments of 1970*, 12 Boston College Industrial and Commercial Law Review 571, 574-93 (1971).

standards and of enforcing the rules promulgated as part of those plans. Aside from the well publicized provisions dealing with motor vehicle emission standards and other limited areas not relevant herein, the federal legislation did not, of itself, purport to make any specific activity unlawful.

The 1970 amendments to the Clean Air Act were responsive to widespread criticism of the ineffectiveness of the 1967 amendments in general and of the way they were being administered in particular. See, *The Clean Air Amendments of 1970, supra* at n.4, at 577-581. The 1970 amendments are sufficiently broad and supplant enough of the 1967 amendments to constitute the entirely new statutory scheme presently in effect. They do, however, retain much of the philosophy of the 1967 amendments in their approach toward state responsibility for regulation with the important difference that tight federal control is maintained throughout in order to ensure the enactment of effective and comprehensive regulatory programs.

Under the 1970 amendments the Administrator of the Environmental Protection Agency must publish ambient air quality standards for each pollutant for which criteria had been established under the previous legislation.[6] 42 U.S.C. 1857c-4 (1970). The 1970 amendments are not regulatory in nature. Aside from provisions, not relevant here, dealing with motor vehicle emissions, they do not purport to prohibit any

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[6]The Administrator is required to publish "primary" and "secondary" standards, the former at levels sufficient to protect health, the latter at levels necessary to protect public welfare. On November 25, 1971, the Administrator did publish such standards for the pollutants commonly associated with motor vehicle emissions: photochemical oxidants, carbon monoxide and nitrogen dioxide. 40 C.F.R. §§ 50.8, 50.9 and 50.11.

specific activity. Rather they mandate regulatory activity by the states and by the Administrator to create a comprehensive and integrated program of prohibitions and limitations for the attainment of the ambient air quality standards, specifically requiring, for the first time, the inclusion of programs of traffic control. The initial responsibility for devising implementation plans for achieving these standards is left with the states. The Administrator is given the primary responsibility of designating for regulation new stationary pollution sources and for setting emission standards for them (42 U.S.C. 1857c-6), and for adopting regulations dealing with hazardous pollutants not covered by the ambient air quality standards (42 U.S.C. 1857c-7). The 1970 amendments give the Administrator the authority and the obligation to promulgate his own implementation plan for any given area should the state involved fail to meet the deadlines for promulgation contained in the Act. 42 U.S.C. 1857c-5.

2. Regulatory Structure at the Time the Action Was Filed.

When this action was brought, no comprehensive implementation plan had yet been adopted for the region containing the Los Angeles Metropolitan Area. Many of the substantive provisions of the implementation plan proposed by the State of California as they related to that region had been rejected by the Administrator, although portions of the plan had been adopted. 40 C.F.R. part 52, subpart F. In addition, the Administrator had proposed several well publicized supplemental traffic control regulations for inclusion in this region's implementation plan. At that time, however, there were no regulations in effect that purported

to govern the activity involved in the development at issue here.

3. Statutory and Regulatory Developments Since the Action Was Filed.

Since October 23, 1973, the Administrator has promulgated two distinct but overlapping sets of regulations requiring preconstruction review of developments similar to Fashion Park. The first set of regulations, the California Transportation Control Plan, was published November 12, 1973 [38 Federal Register No. 217, at 31231; 40 C.F.R. part 52, subpart F], as a portion of the California implementation plan. Relevant portions of the California Transportation Control Plan required the Administrator or his designee to review, prior to construction or modification, the development or addition of a specified number of parking spaces to any parking facility. 40 C.F.R. § 52.251. This review procedure applies to facilities whose construction or modification was commenced after August 15, 1973. The effective date of these regulations has been deferred by successive amendments by the Administrator to June 30, 1975. 39 Fed. Reg. No. 3, at 1025 (January 4, 1974); Reg. No. 10, at 1848 (January 15, 1974); 39 Fed. Reg. No. 200 at 36870 (October 15, 1974).

The second set of regulations are those which appellants sought from the Administrator below, regulations governing review of "indirect sources," *i.e.*, developments which do not themselves emit pollutants but which have associated activities which do so. The Indirect Source Regulations were published February 25, 1974 and are incorporated into the implementation plans of several states, including California. 39 Fed.

Reg. No. 38, at 7270-7285; 40 C.F.R. § 52.22. The Indirect Source Regulations, which also cover developments like Fashion Park, require the Administrator or his designee to review, prior to construction or modification, parking facilities of specified capacities within a Standard Metropolitan Statistical Area, such as Los Angeles. The regulations are effective January 1, 1975, and cover developments commenced after that date.

The Clean Air Act was amended in June of this year by the enactment of the Energy Supply and Environmental Coordination Act of 1974. 88 Stat. 246 (1974 U.S. Code Cong. & Admin. News 1663-1685). Section 4(b) of that act prohibits certain types of regulation of parking facilities, requires the Administrator to submit certain analyses to Congress and ratifies the deferral until January 1, 1975, of any regulations requiring preconstruction approval of parking facilities.

B. PETITIONER'S CLAIMS WITH REGARD TO ENFORCEMENT OF THE AMBIENT AIR QUALITY STANDARDS BY PRIVATE ACTION WERE PROPERLY DISMISSED.

1. Neither the Clean Air Act nor the Ambient Air Quality Standards Promulgated Thereunder, Absent Implementing Regulation, Prohibit the Development at Issue.

Petitioner has placed its primary hope throughout of this action on an effort to establish prohibitions against the construction of developments such as Fashion Park based solely upon the ambient air quality standards and the nonregulatory provisions of the Act, particularly upon sections 1857c-4 and 1857c-5 of Title 42 which require the promulgation of imple-

menting regulations. Since, as discussed in section A above, those provisions are not aimed at the prohibition of any specific activity, petitioner is unable to point to any explicit prohibition directed toward the development at issue. Petitioner therefore must overcome two substantial hurdles. First, it must argue that the admonitions to the states and to the Administrator to enact implementation plans themselves create the basis for inferring prohibitions against specific activities which are alleged to interfere with attainment of the ambient air quality standards. Second, petitioner must establish that, as part of these inferred prohibitions, there exists a cause of action enabling private citizens to prosecute lawsuits of the nature involved herein. Both arguments are essential to petitioner's claims, and both arguments are wholly at odds with the structure and history of the Act. These arguments are closely related and, hence, discussion of one necessarily overlaps with discussion of the other. Respondents, however, will focus primarily on the first argument in this section and on the second argument in the section that follows.

As has been discussed above, the Act depends for its effectiveness upon specific and objective implementation plans and regulations enacted under it, envisioning a coordinated strategy for each air quality control region for the attainment of the ambient air quality standards. Those standards alone were not intended to affect the sources of pollution. The Senate Committee report notes:

> "The establishment alone of ambient air quality standards has little effect on air quality. Standards are only the reference point for the analysis of the factors contributing to air pollution and the imposition of control strategy and tactics. This

program is an implementation plan." *Report of the Committee on Public Works to Accompany S. 4358,* Senate Report No. 91-1196 at 11-12 (1970).

Indeed, not even the Administrator has authority under the Act to enforce the ambient air quality standards absent specific regulation. His predecessor, the Secretary of Health, Education and Welfare had enjoyed such authority, in limited circumstances, under the 1967 amendments. 81 Stat. 491. This power was eliminated by the 1970 amendments, and the Senate Committee Report indicates that this was a purposeful attempt to avoid the unsatisfactory generality attendant on such a regulatory approach:

> "Because attainment of ambient air quality is possible only through the enforcement of precise and objective emission controls the Committee bill would delete the enforcement requirement for the abatement of violations of the air quality standard." Senate Report, *supra,* at 21.

Ineffectiveness of the prior approach was not the only reason or even the most important reason that enforcement procedures were left solely to the implementation plans and the Administrator's regulations under the 1970 amendments. Air quality control is a complex and multi-faceted problem, requiring a coordinated regional approach for a regional effort to attain the desired standards. The case by case analysis that is the heart of the common law approach to problems is not consistent with this approach and the courts are not equipped to make the complex policy decisions required. *See, Diamond v. General Motors,* 20 Cal. App.3d 374 (1971); *Crandall v. Biergans,* 3 E.R.C.

1827 (Mich. 1972). Indeed, decisions requiring specific methods of air quality control in isolated cases without reference to the integrated plan of control could seriously hinder the effectiveness of the Act by reducing the options open to the states and to the Administrator in formulating control tactics for overall air quality improvement.

Fears of precisely such an effect were voiced during the Senate debates on the inclusion of a private cause of action in the 1970 amendments. Senator Cooper, during his remarks on the floor, indicated that the Committee which reported the bill out had been concerned that "the development of a common law of pollution could reduce the effectiveness of the Clean Air Act." *Congressional Record,* September 22, 1970, p. S16257. As the Committee report states, the private cause of action was allowed to remain because enforcement provisions under the Act would involve only the objective question of whether or not an implementing regulation had been violated:

> "[The private suits provision] would not substitute a 'common law' or court-developed definition of air quality. An alleged violation of an emission control standard, emission requirement, or a provision in an implementation plan, would not require reanalysis of technological or other considerations at the enforcement stage. These matters would have been settled in the administrative procedure leading to an implementation plan or emission control provision. Therefore, an objective evidentiary standard would have to be met by the citizen who brings an action under this section." Senate Report, *supra,* at 36 (1970).

The case at hand is illustrative of the difficulties which Congress intended to avoid by its continued adherence to specific behavior criteria rather than generalized reference to air quality. Petitioner submitted the Affidavit of James Behar [C.T., Vol. I, p. 53] to the District Court in support of its assertion that the development of Fashion Park will result in a deterioration in the quality of air in the immediate vicinity of the shopping center. These respondents, on the other hand, submitted the Joint Affidavit of John Dunzer, Vincent Mestre and Dr. G. S. Samuelson [C.T., Vol. II, p. 99] showing that developments of this nature could be a method of reducing pollution inasmuch as the shopping center would result in the overall improvement of air quality in the San Gabriel Valley as a whole by significantly reducing the total miles driven each day. The District Court was thus asked by appellants not simply to rule that this particular development could not go forward, but also to hold that the approach to pollution control it offered was improper. It would have been neither appropriate nor lawful for the District Court so to restrict the discretion of the Administrator in these matters. The promulgation of specific enforcement provisions must be left where Congress intended, with the states and the Administrator.

2. Appellants Do Not Have Standing to Bring a Private Cause of Action for Enforcement of the Ambient Air Quality Standards Without Reference to Regulations Implementing Those Standards.

The 1970 amendments to the Act do provide for citizens' actions. 42 U.S.C. § 1857h-2. This private cause of action is, however, quite narrow in scope and manifestly does not include actions of the nature con-

templated by petitioner. Private civil actions, other than those against the Administrator, are allowed only when the actions challenged are alleged to be "in violation of an emission standard or limitation under the Act or an order issued by the Administrator or a State with respect to such a standard or limitation." 42 U.S.C. § 1857h-2(a). "Emission standard or limitation under this Act" is further defined, in pertinent part, as:

> "A schedule or timetable of compliance, emission limitation, standard of performance or emission standard. . . ." 42 U.S.C. § 1857h-2(f).

Schedules, timetables of compliance and emission limitations are all required elements to be included in state implementation plans. 42 U.S.C. § 1857c-5(a)(2)(B) (1970). Standards of performance and emission standards are to be elements of state plans and Administrator regulations dealing with stationary sources. 42 U.S.C. §§ 1857c-6(a) and (d), 1857c-7(b) (1970). Nowhere in the Act are the ambient air quality standards, as petitioner would have the Court believe, treated as "emission standards or limitations." It is thus evident, as the legislative history discussed in section B.1 above would lead one to expect, that the private action provided in the Act may be maintained against private entities only to enforce compliance with specific existing regulations.

Petitioner continues to press for a right of action independent of implementing regulation, however, arguing somewhat viscerally that the Administrator has failed to comply with the timetables established by the Clean Air Act for the promulgation of such regulation. This failure, petitioner suggests, would leave the Act impotent in the absence of the right of action it asserts and thereby justifies the judicial creation of a pri-

vate cause of action where none is provided. This argument is without merit, for petitioner is hardly without remedy. Its appropriate action, should it be correct in its assertion that the Administrator has not complied with the timetable for promulgation, would be for mandamus requiring promulgation.[7]

More fundamentally, however, petitioner has failed to bring to the attention of this Court the recent regulatory and legislative developments outlined in subsection A.3 above which indicates that the Administrator is fully in compliance with the timetable of the Clean Air Act in the adoption of regulations dealing with facilities such as Fashion Park. On February 25, 1974, the Administrator promulgated the Indirect Source Regulations which require preconstruction review and approval of facilities such as Fashion Park. 39 Fed. Reg. 7270; 40 C.F.R. § 52.52. The effective date of these regulations is January 1, 1975, hence excluding Fashion Park from the requirements. However, far from being in conflict with the Act, this late effective date has been explicitly authorized by section 4(b) of the Energy Supply and Environmental Coordination Act.[8]

Therefore, in contrast to the impression which petitioner has attempted to create, there presently exist regulations governing facilities of the nature involved herein. It is true that these regulations do not affect Fashion Park because of their effective date of January 1, 1975, but this effective date has been explicitly au-

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[7]At the time this action was filed, the Administrator was, in fact, already acting pursuant to just such a mandate. *See Riverside v. Ruckelshaus*, 4 E.R.C. 1728 (C.D. Cal. 1972).

[8]The Energy Supply and Environmental Coordination Act also ratified a similar deferral of the effective date of the parking management provisions of the California Transportation Control Plan. See section A.3 above.

thorized by Congress. Respondents thus respectfully submit, petitioner's rhetoric aside, that the Administrator is in compliance with the Act's timetables and the construction of Fashion Park is being carried forward in full compliance with the plainly expressed intent of Congress.

D. PETITIONER'S ARGUMENTS BASED UPON THE PROVISIONS OF 42 U.S.C. § 1857h-1 WERE NOT RAISED BELOW AND ARE IMPROPERLY INCLUDED IN ITS PETITION HEREIN.

In its petition, petitioner suggests that the provisions of 42 U.S.C. § 1857h-1, the pollution emergency provision of the Clean Air Act, provide authority for the issuance of a writ of mandamus addressed to the Administrator requiring him to act to prevent the operation of Fashion Park. Petitioner appears to argue, first, that this section authorizes private suits against fancied sources of pollution and, second, that the Administrator can be compelled by such suits to exercise the powers bestowed upon him by that section to achieve the results that petitioner seeks herein.

These contentions appeared for the first time on appeal. Petitioner never suggested these arguments to the District Court, and respondents had no opportunity to argue these issues in that forum. Under these circumstances, it was perfectly proper for the Court of Appeals to reject consideration of these arguments. *Westinghouse Electric Corp. v. Weigel*, 426 F.2d 1356 (9th Cir. 1970); *Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968), *cert. denied* 392 U.S. 914.

In an effort to excuse the untimely manner in which these contentions were raised, petitioner asserts that the alleged facts which gave rise to this argument were wholly unknown until petitioner filed the affidavit of

Dr. Goldsmith on November 16, 1973. This somewhat improbable contention, even if accepted, offers feeble excuse for petitioner's failure to raise this argument below. By its own admission, all the facts ware available by November 16, 1973. The District Court did not render its opinion until nearly one month later and did not lose jurisdiction of this matter until the Notice of Appeal was filed on January 9, 1974. Petitioner had ample opportunity to bring these matters to the District Court's attention, but chose not to do so. Having made that decision, it could not repent of it and raise those matters for the first time on appeal.

In any event, the arguments which petitioner attempted to inject into the appeal do not alter the propriety of the result reached by the District Court. The legislative history of the Clean Air Act plainly shows that the emergency powers contained in 42 U.S.C. § 1857h-1 were intended to provide emergency remedies to handle "unusual atmospheric inversion or other extraordinary grouping of circumstances creating a substantial and imminent danger to public health," and not to handle "chronic or generally recurring pollution problems" such as those extant in the San Gabriel Valley.[9] House Report No. 728, October 3, 1967, reprinted in 1967 U.S. Code Congressional and Administrative News, Vol. 2 at 1964 (dealing with the original pollution emergency provisions in the 1967 legislation). *Accord* Senate Report No. 911196, September 17, 1970, at 35-36 (discussing the present wording of these provisions). The provisions of 42 U.S.C. § 1857h-1 are thus wholly inapplicable to the issues at hand.

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[9]These powers are, of course, reserved solely to the Administrator of the Environmental Protection Agency and are not, as appellants seem to suggest, available to private persons.

Conclusion.

Respondents Anita Associates and Santa Anita Consolidated, Inc. respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Section 1857c-5, Title 40, United States Code.

(a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c-4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof.

* * *

(c) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(1) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, * * *

(d) For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements a national primary or secondary ambient air quality standard in a State.

Section 1857c-6, Title 40, United States Code.

(a) For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

Section 4(b), Pub. Law 93-319, 88 Stat. 246.

(b) Subsection (c) of section 110 of the Clean Air Act is amended by inserting "(1)" after "(c)"; by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively, and by adding at the end thereof the following new paragraph:

* * *

"(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before constructing which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

"(D) For purposes of this paragraph—

"(ii) The term 'management of parking supply' shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

* * *